97th Congress
2d Session

SENATE

Report
No. 97–465

HUMAN LIFE FEDERALISM AMENDMENT

REPORT

TOGETHER WITH

ADDITIONAL AND MINORITY VIEWS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S.J. RES. 110

June 8, 1982.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
91-201 O **WASHINGTON : 1982**

S528-17

COMMITTEE ON THE JUDICIARY

[97th Congress]

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ROBERT DOLE, Kansas
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
MAX BAUCUS, Montana
HOWELL HEFLIN, Alabama

Vinton DeVane Lide, *Chief Counsel*
Quentin Crommelin, Jr., *Staff Director*

Subcommittee on the Constitution

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
CHARLES E. GRASSLEY, Iowa

DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont

Stephen Markman, *Chief Counsel and Staff Director*
Randall Rader, *General Counsel*
Claire Greif, *Chief Clerk*
Bob Feidler, *Minority Counsel*

CONTENTS

Page

I. S.J. Res. 110 — 1
II. Summary — 2
III. History of Committee Action — 5
IV. *Roe* v. *Wade* — 7
V. The Progeny of *Roe* v. *Wade* — 10
VI. Legal Context of *Roe* — 20
VII. Jurisprudence of *Roe* — 24
VIII. Techniques of Abortion — 35
IX. Social Impact of *Roe* — 36
X. Abortion and Public Opinion — 48
XI. Overturning Supreme Court Decisions by Amendment — 53
XII. Legal Meaning and Effect of S.J. Res. 110 — 54
XIII. Miscellaneous Issues — 60
XIV. Some Questions and Answers on the Human Life Federalism Amendment — 62
XV. Conclusion — 64
XVI. Cost Estimate — 64
XVII. Additional Views of Senator Simpson on S.J. Res. 110 — 65
XVIII. Minority Views of Senators Leahy and Baucus — 67

Calendar No. 658

97th Congress 2d Session } SENATE { Report No. 97-465

HUMAN LIFE FEDERALISM AMENDMENT

June 8, 1982.—Ordered to be printed

Mr. Hatch, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S.J. Res. 110]

The Committee on the Judiciary, to which was referred the joint resolution (S.J. Res. 110) proposing an amendment to the Constitution to declare that no right to abortion shall be found in the Constitution and to authorize the States and Congress to legislate with respect to abortion, having considered the same, reports favorably thereon with an amendment and recommends that the joint resolution as amended do pass.

The text of Senate Joint Resolution 110 as amended is as follows:

I. Senate Joint Resolution 110

To amend the Constitution to establish legislative authority in Congress and the States with respect to abortion

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE—

"A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent

> power to restrict and prohibit abortion: *Provided*, That a provision of a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern.".

The proposed amendment is sponsored by Senator Hatch and co-sponsored by Senators Nickles, Boschwitz, Denton, Symms, Humphrey, and Zorinsky.

II. SUMMARY

On January 22, 1973, the United States Supreme Court handed down a decision that has since generated social divisions in this Nation virtually without precedent. In the case of *Roe* v. *Wade*,[1] a majority of seven on the Court identified for the first time a right to abortion within the terms of the Fourteenth Amendment to the Constitution. The nature of this right, outlined in great detail in Justice Blackmun's opinion, was such as to result in the overturning of the laws on abortion in each of the fifty States of the Union.

Prior to the *Roe* decision, 31 States of the Union had enacted statutes that totally protected unborn human life from the time of conception. Of the remaining 19 States that permitted abortion under limited circumstances, abortion was legal only, as a general rule, where necessary to protect the life of the mother, in cases of rape or incest, or in cases where there was a likelihood that a child would be born with a substantial mental or physical deformity. In only four States did anything approximating abortion-on-demand exist and in each of these States there were temporal limits to such a right. The most liberal of these provisions was probably that existing in the State of New York, in which abortions without restrictions were permitted until the sixth month of pregnancy.

As a result of *Roe*, however, a new regime was created in this country on the abortion issue—a regime more permissive with respect to abortion than had existed in any one of the fifty States prior to January 22, 1973. As a result of the *Roe* decision, a right to abortion was effectively established for the entire term of a pregnancy for virtually any reason, whether for sake of personal finances, social convenience, or individual life-style.

Despite misconceptions on this issue, there is relatively little informed disagreement that *Roe* has established a national policy on abortion without legal restrictions of any significant kind. During the first trimester of pregnancy, the plenary right to abortion is made express by the terms of *Roe*. As the Court stated,

> For the stage prior to approximately the end of the first trimester of pregnancy, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.[2]

During the second trimester, a public interest in abortion arises—an interest in protecting and preserving the health of the mother. This interest may be expressed through governmental requirements that such abortions be performed within hospitals, clinics, or other licensed facilities. As the Supreme Court again stated,

> For the stage subsequent to approximately the end of the first trimester, the State in promoting its interest in the health

---

[1] 410 U.S. 113 (1973).
[2] Id. at 164.

> of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.[3]

During the second trimester, however, there remains an absence of legislative authority to do anything more than ensure the safety of the procedures of abortion. There are no protections whatsoever for the unborn child during this stage of pregnancy.

During the final trimester of pregnancy—or approximately at that point at which the fetus reaches "viability"—a compelling interest finally arises in protecting unborn life. As the Court stated,

> For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[4]

The exception to this authority in the State to limit abortion following "viability"—in cases where the mother's "life or health" were involved—effectively consumed the rule, however. The critical element was the term "health of the mother".

According to the Court in the companion case of *Doe* v. *Bolton*,[5] whether or not the "health of the mother" necessitated an abortion was a medical judgment to be made

> in the light of all factors—physical, emotional, psychological, and the woman's age—relevant to the well-being of the patient.[6]

In other words, to quote Professor John Noonan of the University of California Law School, the absolute and plenary right to abortion was curbed during the final trimester only by the "necessity of a physician's finding that she needed an abortion."[7] It would be a rare physician who would be incapable of defending an abortion decision on the grounds that in his best medical judgment the "well-being" of the mother demanded it.

As Professor Noonan has summarized the nature of the restrictions placed upon the abortion right in *Roe* and *Doe*,

> For the nine months of life within the womb, the child was at the [pregnant woman's] disposal—with two restrictions: She must find a licensed clinic after month three; and after her child was viable, she must find an abortionist who believed she needed an abortion.[8]

Thus, the Committee observes that no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy.

It is this rule of abortion-on-demand imposed upon a citizenry whose values were sharply at variance that has created nearly a decade of intense divisions and passions on the issue of abortion. During this decade, the social views of a relatively small number of individuals has reigned as the law of the land immune from even the most modest efforts of reform. In judicial decisions subsequent to *Roe*, the Supreme Court has expanded upon its decision in *Roe* by striking down statutes to require the consent to an abortion by the father of the unborn, statutes to require parental consent to abortions performed upon minors, statutes to ensure that pregnant women are fully apprised of alternatives to abortion, and statutes to protect live-born fetuses.

---

[3] Id.
[4] Id. at 164–65.
[5] 410 U.S. 179 (1973).
[6] Id. at 192.
[7] J. Noonan, A Private Choice 12 (1979).
[8] Id.

The proposed Human Life Federalism Amendment is addressed to the *Roe* decision as well as the progeny of *Roe*. The objective of the proposed amendment is relatively simple—it would restore to the States and establish within Congress clear authority to legislate with respect to abortion, largely restoring the status quo that existed prior to the *Roe* decision. Unlike many other proposed amendments on the subject of abortion, it would not obligate the States or Congress to legislate; it would simply restore to them the authority to do so. By "deconstitutionalizing" the issue of abortion, the proposed amendment would allow the legislative branches of government a wide variety of options with respect to this matter. While by the terms of the proposed amendment, a State legislature or Congress could totally prohibit abortion or could totally maintain the status quo of abortion-on-demand, they would also be in the position to undertake reforms that fall somewhere between these all-or-nothing propositions. For example,

(1) They could place restrictions of some form upon late-term abortions;

(2) They could impose obligations upon physicians to save the lives of fetuses capable of surviving an abortion;

(3) They could place limitations upon genetic engineering and other experimental and medical research involving the use of human embryos and fetuses;

(4) They could require that women contemplating abortions be fully apprised of the risks of abortion and the alternatives to abortion;

(5) They could require some form of parental consent to abortions performed upon minors;

(6) They could require some form of spousal consent to abortions;

(7) They could establish some minimum waiting period before an abortion could take place or require some form of professional consultation prior to an abortion;

(8) They could establish rights of refusal to perform abortions in physicians or nurses, or in entire hospitals;

(9) They could limit the commerce in abortifacient devices;

(10) They could prohibit abortion generally subject to certain well-defined exceptions and safeguards; or

(11) They could undertake any other form of restriction or regulation upon the abortion procedure.

In removing the abortion controversy from the Federal judicial branch, the proposed Human Life Federalism Amendment would place the abortion debate within those institutions of Government far better equipped to deal with this controversial issue. By its very nature, the judiciary is the wrong forum within which to resolve the abortion issue. Because they cannot control the specific types of cases that come before them and because they are limited in their ability to fashion compromise solutions to difficult issues, the courts are an inappropriate place within which to debate abortion.

The all-or-nothing legalization of abortion-on-demand in *Roe* has done nothing but exacerbate the tensions already created by the abortion controversy. Unlike most legislative solutions, in which some element of deference is paid to all major political or social or occupational groupings, the abortion decision involved a small group of seven men who were totally able to disregard the passionately held views of a large segment of the American people. They did this not in response to the unequivocal demands of the operative document of our Nation, but through a decision whose jurisprudence and whose textual and historical foundations are at least as suspect as the policies that it fostered.

Perhaps the foremost objective of the proposed amendment is to facilitate the development of a social consensus on the difficult issue of abortion. The abortion issue, if it is to be elevated into an issue of constitutional proportions, should be elevated only through the normal consensus-building procedure of the Article V amending process rather than through the process of judicial re-interpretation. S.J. Res. 110 would re-enfrancise *all* the people in fashioning a solution to the abortion controversy or, if not a solution, at least an equilibrium. This can only be done by placing this issue back within the representative branches of the government where it should have remained all along. If the result is that difficult legislative compromises are reached through bitter sessions of negotiation and give-and-take—compromises that are not entirely satisfactory to those on either end of the spectrum on this issue—then the issue of abortion will have been dealt with in the same manner that most other difficult matters are dealt with in a democratic system of government.

If the social divisions that have beset this country since the *Roe* decision are to be overcome, they will have to be overcome through a process in which all shades of opinion are considered and weighed, not simply those of a small minority of the citizenry. There is no more appropriate forum in a free society for these kinds of controversies to be debated and resolved than in the representative, legislative branches of government. Although some may observe—correctly—that basic issues of individual rights are not subject to referendum in a free society, this, of course, begs the basic question, which is precisely what those rights are and what their relative priorities are. It is the resolution of these precise questions that is unlikely to occur in the absence of a constitutional amendment of the sort of the Human Life Federalism Amendment.

III. History of Committee Action

The Subcommittee on the Constitution of the Senate Committee on the Judiciary had referred to it during the 97th Congress four resolutions proposing amendments to the Constitution of the United States relating to abortion: S.J. Res. 17 (introduced by Senator Garn); S.J. Res. 18 (introduced by Senator Grassley); S.J. Res. 19 (introduced by Senator Helms); and S.J. Res. 110 (introduced by Senator Hatch).

The Subcommittee held nine days of hearings on the subject of proposed abortion amendments from October 5, 1981 through December 16, 1981. Appearing before the Subcommittee were the following witnesses: on October 5, the Subcommittee heard testimony from U.S. Senator Robert Packwood of Oregon; Professor John Noonan, Jr., University of California at Berkeley; and Professor Laurence Tribe, Harvard University.

On October 14, the Subcommittee heard testimony from Dr. Carl Tyler, Assistant Director for Science of the Center for Disease Control; Dr. Irvin Cushner, University of California; Dr. Bernard Nathanson, New York City; and Dr. Thomas Hilgers, Creighton University.

On October 19, the Subcommittee heard testimony from Dr. Richard Schmidt, University of Cincinnati; Dr. George Ryan, President of the American College of Obstetricians and Gynecologists; Dr. Jasper Williams, Jr., Bernard Hospital, Chicago, Illinois; Dr. Haig Kazazian, Johns Hopkins University; and Terry Beresford, Director of Professional Training Institute of Planned Parenthood of Maryland.

On November 4, the Subcommittee heard testimony from U.S. Representative William Green of New York; U.S. Representative Victor Fazio of California; Dr. William Stayton, Thomas Jefferson University; Professor Vincent Rue, University of California at Los Angeles; and Joy Dryfoos, writer and researcher on family planning.

On November 5, the Subcommittee heard testimony from Terence Cardinal Cooke, and Archbishop John Roach, National Conference of Catholic Bishops; Dr. Adrian Rogers, former President of the Southern Baptist Convention; Rabbi Seymour Siegel, Jewish Theological Seminary; Rabbi Henry Siegman, American Jewish Congress; Professor Charles Reynolds, University of Tennessee; and Bishop George Hunt, Episcopalian Diocese, Providence, Rhode Island.

On November 12, the Subcommittee heard testimony from U.S. Representative Theodore Weiss of New York; Professor Donald Reagan, University of Michigan; Professor Lynn Wardle, Brigham Young University; Professor Thomas Gerety, University of Pittsburgh; and Professor Richard Stith, Valparaiso University.

On November 16, the Subcommittee heard testimony from Dennis Horan, Americans United for Life; U.S. Representative Joel Pritchard of Washington; Professor Herma Hill Kay, University of California at Berkeley; Professor Germain Grisez, Mount Saint Mary's College; Professor Norman Dorsen, New York University; Frank Susman, Attorney; and Professor Victor Rosenblum, Northwestern University.

On December 7, the Subcommittee heard testimony from Professor Raymond Adamek, Kent State University; Barbara Bryant, Vice-President, Market Opinion Research; Rosemary Meyer, National Committee for a Human Life Amendment; Father Charles Fiore and Peter Gemma, National Pro-Life Political Action Committee; Judith Widdecombe, National Abortion Rights Action League; Patricia Gavett, Religious Coalition for Abortion Rights; Faye Wattleton, Planned Parenthood Federation of America; Mary Purcell, American Association of University Women; Raydean Acevedo, Mexican

American Women's Association; Kathy Wilson, National Women's Political Caucus; Barbara Reach, New York City Commission on the Status of Women; Rabbi Mindy Portnoy, Union of American Hebrew Congregations, Central Conference of American Rabbis; Dr. Allan Rosenfield, American Public Health Association.

On December 16, the Subcommittee heard testimony from U.S. Representative Vin Weber of Minnesota; U.S. Representative Louis Stokes of Ohio; Dr. John Willke, National Right to Life Committee; Darla St. Martin, Minnesota Citizens Concerned for Life; Linda Tarr-Whelan, National Education Association; Ruth Jordan, Coalition of Labor Union Women; Beth Lief, NAACP Legal Defense Fund; Denise Neary, Pennsylvania Pro-Life Federation; Jane Wells Schooley, National Organization for Women; U.S. Representative Christopher Smith of New Jersey; Shirley Leviton, National Council of Jewish Women; Mary Bricker-Jenkins, National Association of Social Workers; Elizabeth Verdesi, United Presbyterian Church Council; Jan Wilkins, American Citizens Concerned for Life; Bella Abzug, Women U.S.A.; Alfred Moran, Planned Parenthood of New York City; Paulette Joyer, Feminists for Life of America; Sherry Matulis, Protect Abortion Rights, Inc.; Nellie Gray, March for Life; Emily Moore, National Women's Health Network; Jean Doyle, Florida Right to Life Committee; Paul Brown and Robert Sassone, Life Amendment Political Action Committee; and David O'Steen, Committee for a Pro-Life Congress.

In addition, the Subcommittee received a large number of written statements from other interested individuals and organizations that will become a part of the permanent record of these hearings. Senator Orrin G. Hatch of Utah, Chairman of the Subcommittee on the Constitution, chaired the hearings.

On December 16, 1981, the Subcommittee on the Constitution voted to report out S.J. Res. 110 after having adopted three amendments offered en bloc by Senator Hatch. The amendments were as follows: (1) On page 2, line 8, strike the second "the"; (2) On page 2, line 9, strike "abortions" and insert in lieu thereof "abortion"; and (3) Strike page 2, lines 10 and 11, and insert in lieu thereof: "a provision of a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern.". The vote to report out the proposed amendment as amended was 4–0 with Senators Hatch, DeConcini, Thurmond, and Grassley in support.

On March 10, 1982, the Senate Committee on the Judiciary voted to favorably report out S.J. Res. 110 as amended by a vote of 10–7. Voting in favor of such a report were Senators Thurmond, Laxalt, Hatch, Dole, Simpson, Grassley, East, Denton, Biden, and DeConcini. Voting in opposition were Senators Mathias, Specter, Kennedy, Byrd, Metzenbaum, Leahy, and Baucus.

IV. *ROE* v. *WADE*

The U.S. Supreme Court's most consequential decision concerning the matter of abortion came in 1973 in *Roe* v. *Wade*.[9] That case involved the challenge by a pregnant single woman (under the pseudonym of Jane Roe) to the State of Texas' criminal abortion statute.

---

[9] 410 U.S. 113 (1973).

That statute made it a crime to procure, or attempt to procure, an abortion, except on medical advice for the purpose of saving the life of the mother. It was typical of the kind of statute which had been in effect in many States for over a century. Alleging that she was unmarried and wished to have an abortion performed by a competent, licensed physician, but that she was unable to get a legal abortion because her life did not appear to be threatened by continuation of the pregnancy, the plaintiff challenged the statute as unconstitutional on a number of theories, including abridgement of her right of personal privacy under various constitutional provisions.

Before addressing itself to the constitutional questions, the Court embarked upon a review of the history of abortion from ancient to modern times. After considering abortion practices among the ancient Persians, Greeks, and Romans, it concluded that ancient religion did not bar abortion.[10] With respect to the Hippocratic Oath's famous promise, "I will not give to a woman an abortive remedy," the Court, after examining the views on abortion of various Greek thinkers, concluded that the abortion clause of the Oath represented not the prevailing view of all ancient physicians but only of a small segment of Greek opinion. Its popularity in later times was attributable, the Court found, to its being in agreement with the emerging teachings of Christianity.[11]

With respect to the common law of England, the Court found, based upon recent reexamination of the precedents that, despite the influential statement of Coke that abortion of a woman quick with child was "a great misprision, and no murder," abortion was never a common-law crime even with respect to a quick fetus.[12] After tracing the development of the statutory law of England and the United States respecting abortion from the early 19th century to recent times—a development of gradually increasing criminal liability until the late sixties and early seventies—the Court concluded that,

> [a]t least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice [to have an abortion] was present in this country well into the 19th century.[13]

The Court also reviewed the positions of various national professional groups (the American Medical Association, the American Public Health Association, and the American Bar Association) regarding abortion. The views of the AMA during the 19th century, the Court found, tended to coincide closely with the increasingly restrictive legislation against abortion. The views of all three organizations, it was shown, had become more permissive toward abortion by the early 1970s.[14]

The Court gave special consideration to the historical bases for enactment of the 19th century criminal abortion laws. It found no basis for concluding that such laws were the product of a Victorian social concern to discourage illicit sexual conduct. But it did find an important basis for enactment of these laws to have been concern with abortion as a medical procedure and its potentially hazardous effects on women. If found these effects to have been lessened in modern times. Accordingly, it recognized a somewhat diminished interest of the state in restricting the availability of abortion on that ground, one which, in effect, corresponded to the degree of risk involved.

---

[10] Id. at 130.
[11] Id. at 132.
[12] Id. at 136.
[13] Id. at 140–41.
[14] Id. at 141–47.

> [A]ny interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forego it, has largely disappeared.[15]

With respect to the State's interest in the protection of prenatal life, the Court indicated that

> recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone.[16]

After this preliminary groundwork, the Court addressed itself to the principal aspect of the case. Invoking the right of privacy, to which it had given recognition in earlier cases as a right implicit in various other constitutional provisions, the Court pointed out that the right extended to activities relating to such areas as marriage, procreation, contraception, family relationships and child rearing. Leaving open the precise constitutional basis of this right, the Court held that it "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [17] As justification for this expansion of the right of privacy, the Court set forth factors relating to the "detriment" that the State would impose on the woman by entirely denying this choice to the woman, including "the distress, for all concerned, associated with the unwanted child. . . ." [18] The Court nevertheless indicated that this right was not absolute, and that at some point interests of the State could become sufficiently compelling to permit it to regulate some of the factors governing the abortion decision.[19]

The Court considered two arguments offered to establish a compelling State interest justifying incursion upon the abortional freedom which the Court had just recognized as a facet of the right of privacy. The first of these was the contention that the fetus is a "person" within the meaning of the Fourteenth Amendment to the Constitution. The Court indicated that,

> [i]f this suggestion of personhood is established, the [plaintiff's] case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.[20]

The Court, however, found the argument to be without merit. Based upon the use of the term "person" throughout the Constitution, as well as its observation that throughout the major portion of the 19th century prevailing abortion practices were "far freer than they are today," the Court concluded that the unborn were not "persons" within the meaning of the Fourteenth Amendment.[21]

---

[15] Id. at 149.

[16] Id. at 150.

[17] Id. at 153. In a later case, *Harris* v. *McRae,* 100 S. Ct. 2671, 2686 (1980), the Court described the "constitutional underpinning" of *Roe* as the "Due Process Clause of the Fourteenth Amendment."

[18] Id.

[19] Id. at 154.

[20] Id. at 156–57.

The second argument which the Court considered was the contention that, apart from the Fourteenth Amendment, life begins at conception and the State has a compelling interest in protecting life from and after conception. Focusing primarily on the failure of the various disciplines of medicine, theology, and philosophy to agree on when life begins, the Court declined to resolve the question, thus leaving the argument to fail by virtue of the Court's own declination to address the threshold issue.[22]

The Court finally established the parameters of the abortion liberty. The Court recognized the State as having an "important and legitimate interest in preserving and protecting the health of the pregnant woman," an interest which becomes "compelling" enough to permit some State regulation of abortion only at approximately the end of the first trimester.[23] After that point the State may enact regulations to preserve the health of the woman (by, for example, licensing abortion facilities).

The Court also found that the State has an "important and legitimate interest in protecting the potentiality of human life," and that this interest becomes "compelling" only at the point of "viability," because "the fetus then presumably has the capability of meaningful life outside the mother's womb." [24] After this point the State may restrict abortion or even prohibit it, "except where it is necessary to preserve the life or health of the mother." [25]

This recognition of a "compelling" State interest after "viability" has been viewed by some as a significant limitation upon the abortion liberty described in *Roe.* But in the accompanying case of *Doe* v. *Bolton*,[26] the Court defined "health" in such an expansive manner as to swallow up the State interest seemingly recognized in *Roe.* In *Doe* the Court stated:

> . . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.[27]

In Professor Noonan's words, the Court ruled that "after her child was viable, she must find an abortionist who believed she needed an abortion." [28]

V. The Progeny of *Roe* v. *Wade*

The subsequent development of the abortional right promulgated by the Court in *Roe* v. *Wade* has largely been one of expansion of the right to its fullest possible limits through the gradual elimination of virtually all possible impediments to its exercise. Review of the opinions of the Court which followed *Roe* v. *Wade* demonstrates this development.[29]

---

[21] Id. at 158.
[22] Id. at 159.
[23] Id. at 163.
[24] Id.
[25] Id. at 165–66.
[26] 410 U.S. 179 (1973).
[27] Id. at 192.
[28] J. Noonan, A Private Choice 12 (1979).

In *Doe* v. *Bolton*, the Court invalidated, on Fourteenth Amendment grounds, various procedural requirements contained in a recently enacted criminal abortion statute of the State of Georgia. Before reaching these procedural aspects of the statute, the Court considered and upheld against a vagueness challenge the requirement that the physician find the abortion to be "necessary." [30] Citing its decision in *United States* v. *Vuitch*,[31] the Court found that such a standard left latitude for the physician to consider all factors relating to "health" and therefore was within the ambit of "judgment[s] that physicians are obviously called upon to make routinely whenever surgery is considered." [32] The broad applicability of the term "health" as the Court defined it

> allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[33]

The Court found the statute's requirement that permissible abortions be performed in hospitals accredited by the Joint Commission on Accreditation of Hospitals was constitutionally invalid on the ground that such requirement was not "based on differences that are reasonably related to the purpose of the Act in which it is found." [34] The Court recognized the permissibility of the States adopting standards for the licensing of all facilities where abortions may be performed after the first trimester so long as the standards are "legitimately related" to permissible State objectives. Nevertheless, it felt compelled to agree with the appellants that the State had failed to justify a requirement that such abortions be performed in a licensed hospital, as opposed to a facility (such as a clinic) with all staffing and services necessary to perform abortions safely (including means of handling complications).[35] The Court also found the hospital requirement per se invalid because of its failure to exclude the first trimester of pregnancy.[36]

The Court also struck down the Georgia statute's requirements of prior approval of an abortion by both a committee of the hospital's medical staff in which the operation is to be performed and two other licensed physicians. It found such requirements to be "basically redundant" and without rational connection to a patient's needs, as well as unduly restrictive of the physician's right to practice.[37] The statute's requirement of residency within the State was found to be unrelated to any legitimate State interest (such as conservation of limited State-supported medical resources for residents of the State).[38]

The Court next adverted to the matter of abortion in a very different context. In *Bigelow* v. *Virginia*,[39] the Court considered a Virginia statute which had made it a misdemeanor for any person to encourage or promote the procuring of abortion or miscarriage by publication, lecture, advertisement or sale or circulation of any publication, or in any other manner. In 1971, before the decision in *Roe* v. *Wade*, the appellant had been convicted under the statute for running an advertisement in a Virginia newspaper which advised its readers of the availability of legal abortions in New York and supplied the particulars as to whom to contact for assistance in obtaining an abortion. The Court held that the kind of speech involved, notwithstanding its commercial character, was fully protected under the First Amendment. Relying upon its holding in *Roe* v. *Wade*, the Court further justified its holding upon the ground that "the activity advertised pertained to constitutional interests." [40] Focusing upon the legality of the advertised services in New York at the time of the publication of the advertisement, the Court rejected the notion that Virginia could

---

[29] No attempt will be made to review the effect of those decisions of the Court which have summarily affirmed, vacated or reversed decisions of lower courts in the abortion area.

[30] 410 U.S. at 191–92.

[31] 402 U.S. 62, 71–72 (1971).

[32] 410 U.S. at 192, quoting from *United States* v. *Vuitch*, 402 U.S. at 72.

[33] 410 U.S. at 192.

[34] 410 U.S. at 194, quoting from *Morey* v. *Doud*, 354 U.S. 457, 465 (1957).

[35] Id. at 195.

[36] Id.

[37] Id. at 197, 199.

[38] Id. at 200.

[39] 421 U.S. 809 (1975).

> prevent its residents from traveling to New York to obtain those services. . . .
>
> A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State. It may seek to disseminate information so as to enable its citizens to make better informed decisions when they leave. But it may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State.[41]

In *Connecticut* v. *Menillo*,[42] the Court corrected a misunderstanding of the scope of its holding in *Roe* v. *Wade* which had arisen in the highest courts of some States. In reliance on certain language in *Roe* v. *Wade*, the Supreme Court of Connecticut had held that State's criminal abortion statute to be "null and void" in its entirety, so as to preclude its enforcement even against a non-physician who had attempted to procure an abortion.[43] Upon appeal by the State, the Supreme Court explained in a *per curiam* opinion that it had not held the Texas statute involved in *Roe* v. *Wade* to be unenforceable against a non-physician abortionist "for the case did not present the issue." [44] Rather, the Court indicated, the "right to an abortion" [45] recognized in *Roe* v. *Wade* was entirely contingent upon its being performed by a competent licensed physician under conditions insuring maximum safety for the woman.[46]

In *Planned Parenthood of Central Missouri* v. *Danforth*,[47] a case which it described as "a logical and anticipated corollary to *Roe* v. *Wade* . . . and *Doe* v. *Bolton*," [48] the Court dealt with some of the secondary issues which were forecast and reserved in those earlier opinions. At issue were various provisions of a comprehensive statute for the control and regulation of abortion which was passed by the Missouri Legislature in 1974, shortly after invalidation of its previous abortion legislation under the authority of *Roe* v. *Wade.*[49]

---

[40] Id. at 822.

[41] Id. at 825.

[42] 423 U.S. 9 (1975).

[43] Id. at 9–10.

[44] 423 U.S. at 10.

[45] It is important to note the Court's use of the term "right to an abortion" as a shorthand characterization of the right which it had recognized in *Roe* v. *Wade*. It has been observed by one respected scholar that "[t]his same language, or similar language (i.e., 'right to an abortion,' 'right *of* abortion') has been used in 84 federal court decisions since *Roe* v. *Wade* and *Doe* v. *Bolton* were decided. The phrase 'right to abortion' is used as shorthand for the constitutional right created in *Roe* and its progeny." Senate hearings, November 12, 1981, Lynn Wardle, Professor, Brigham Young University School of Law.

[46] Id. at 11.

[47] 428 U.S. 52 (1976).

[48] Id. at 55.

The portion of the statute which defined "viability" as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems" was held not to circumvent, or be violative of, the limitations on State regulation outlined in *Roe* v. *Wade.*[50] The Court rejected the appellants' contentions that the statutory definition was defective by reason of its lack of reference to a gestational time period or the three stages of pregnancy, and its use of the term "indefinitely". It found that the prescribing of a specific point in the gestation period as the point of viability is not the function of the courts or legislatures, but, rather, that the determination that a particular fetus is viable is a matter for the professional judgment of the "responsible attending physician." [51]

The Court upheld a requirement of the statute that the woman, prior to submitting to an abortion during the first 12 weeks of pregnancy, certify her consent to the procedure in writing and that such consent be "informed" and freely given and not the result of coercion.[52] The Court invalidated, however, the statute's requirements of prior written consent to an abortion within the first twelve weeks of pregnancy by the spouse or by one parent (or a person in loco parentis) of an unmarried minor under the age of 18 years. In both instances, that of spouse or parent, the Court took the position that any power a family member might have to veto a contemplated abortion would have to be a delegation of State power. Under this analysis, the Court concluded that the State could not delegate such a power to spouse or parents because it lacked the power itself.[53] While recognizing the "deep and proper concern and interest" of a husband "in his wife's pregnancy and in the growth and development of the fetus she is carrying," the Court found that in cases of disagreement a wife's decision must govern because "the view of only one of the two marriage partners can prevail. Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." [54] While reiterating the principle that "minors, as well as adults, are protected by the Constitution and possess constitutional rights," the Court also gave recognition to the State's "somewhat broader authority to regulate the activities of children than of adults." [55] Nevertheless, weighing the State's interests in the safeguarding of the family unit and of parental authority against the right of privacy of the "competent minor mature enough to have become pregnant," the Court found that it could not conclude that "providing a parent with absolute power to override a determination, made by the physician and his minor patient, to terminate the patient's pregnancy will serve to strengthen the family unit" or that "such veto power will enhance parental authority or control where the minor and the nonconsenting parent are so fundamentally in conflict and the very existence of the pregnancy already has fractured the family structure."[56]

---

[49] Id. at 55–56.
[50] Id. at 63–65.
[51] Id. at 64–65.
[52] Id. at 67. In *Guste* v. *Jackson,* 429 U.S. 399 (1977), the Court vacated an injunction of the U.S. District Court for the Eastern District of Louisiana which had enjoined enforcement of that State's statute forbidding performance of an abortion on a minor without her parent's consent, or her husband's consent if she was married. The injunction had been drawn broadly enough to prevent enforcement of a requirement that women other than minors give informed consent. The Court remanded to the district court with instructions that it consider the latter requirements in light of its holding in *Danforth.*
[53] 428 U.S. at 70, 74.
[54] Id. at 69, 71.
[55] Id. at 74.

The Court also found unconstitutional the statute's prohibition of the use of saline amniocentesis as a method of abortion after the first 12 weeks of pregnancy.[57] This requirement of the statute had been based upon an express legislative finding that such technique was "deleterious to maternal health."[58] But the Court rejected the validity of this finding based upon its own assessment of the record. A majority of the Justices found that prostaglandin injection (apparently the only indisputably safer abortion technique for the woman) was not in fact generally available in the State of Missouri. Thus, the practical effect of the prohibition was, by forcing the woman and her physician to terminate her pregnancy by methods more dangerous to her health, to inhibit unreasonably or arbitrarily the vast majority of abortions after the first 12 weeks of pregnancy.[59]

Another provision of the statute required the physician performing an abortion to exercise the same degree of care to preserve the life of an aborted fetus as would be exercised if the fetus had been intended to be born alive. Both criminal (manslaughter) and civil liability were imposed if the physician failed to take measures "to encourage or sustain the life of the child, and the death of the child results."[60] The Court held the provision to be invalid by virtue of its failure to limit its applicability to the period after the viability stage has been reached.[61]

The Court was presented with another State statute requiring parental consent for an abortion to be performed on a minor in *Bellotti* v. *Baird* ("Bellotti I").[62] The Massachusetts statute involved there required the consent of both parents, as well as the pregnant minor, for any abortion to be performed on an unmarried minor under the age of 18, but it also allowed for substituted consent by a Judge of the Superior Court of the Commonwealth, after hearing, "for good cause shown," if one or both parents refused to consent.[63] The Attorney

---

[56] Id. at 75. The Court did, however, leave open the question of whether "every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy." Id. This issue was dealt with later that year. See p. 19 infra.

[57] Id. at 75–79. The statute described the method as one "whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor." Id. at 87. This method, while it was the procedure employed in a substantial majority of post-first-trimester abortions in this country at the time of the Court's decision (id. at 78), is generally considered to be inhumane to the fetus.

[58] Id. at 76.

[59] Id. at 78–79, 101–02.

[60] Id. at 82.

[61] Id. at 83. Thus, implicitly, if such a statute were drawn with applicability limited to "live births" occurring during abortions performed after the point of viability only, it would not be constitutionally invalid. See *Wynn* v. *Scott* 449 F. Supp. 1302 (N.D. Ill. 1978), app. dism'd 439 U.S. 8 (1978), aff'd 599 F.2d 193 (7th Cir. 1979). Cf. *Colautti* v. *Franklin*, 439 U.S. 379 (1979).

[62] 428 U.S. 132 (1976).

[63] Id. at 134–35. The statute made provision for consent by the remaining parent in the event of death or abandonment by the other parent, and for consent by persons in loco parents. It also expressly allowed the operation of common law rights of any person relative to consent. Thus, it appeared to preserve Massachusetts' "mature minor" rule, which allows a child determined by a court to be capable of giving informed consent to be allowed to do so. Id. at 144.

General of Massachusetts urged that the statute was not one which allowed the parents to veto their minor child's decision to have an abortion solely on the ground of their own preferences. Rather, it was urged, it merely gives preference to parental consultation and consent, but permits a mature minor capable of giving informed consent to obtain a court order permitting an abortion without parental consent or consultation, and allows a minor not capable of giving informed consent to obtain an order without parental consultation where there is a showing that an abortion would be in her best interests.[64] Accepting the proffered interpretation as one which might very well be applied by the courts of Massachusetts, and as one which would not unduly burden the right to seek an abortion, the Court decided the case was a proper one for abstention. So long as the Supreme Judicial Court of Massachusetts could interpret the statute so as not to unduly burden the abortion decision, in a manner consistent with the interpretation proffered by the Massachusetts Attorney General, review of the constitutional issues would be, the Court felt, unnecessary.[65]

In *Beal* v. *Doe* [66] the Court was presented with the issue of whether Title XIX of the Social Security Act,[67] which establishes the Medicaid program, requires participating States to fund the cost of non-therapeutic abortions. Under Pennsylvania's federally approved Medicaid plan, financial assistance for abortions was to be provided only upon certification by physicians that same were "medically necessary." [68] Fastening upon the distinction between necessary and unnecessary medical treatment, as well as the State's "valid and important interest in encouraging childbirth," the Court held that, absent a clear mandate in the language or legislative history of Title XIX, there was no federally-imposed obligation upon the States to fund non-therapeutic abortions.[69]

In the companion case, *Maher* v. *Roe*,[70] the Court considered the related question of whether the Constitution requires a participating State which pays for childbirth to pay also for non-therapeutic abortions. Similarly to the Pennsylvania regulation involved in *Beal*, Connecticut Medicaid regulations limited benefits for first trimester abortions to those that were "medically necessary." The regulation was challenged on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. The Court held that notwithstanding its impact on indigent women desiring abortions, the regulation involved no discrimination against a suspect class.

> [T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis.[71]

The Court further held that the regulation placed no obstacles in the pregnant woman's decision to abort, and thus did not impinge upon the fundamental right recognized in *Roe* v. *Wade*.

> The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but

---

[64] Id. at 144–45.
[65] Id. at 148. See p. 17 infra.
[66] 432 U. S. 438 (1977).
[67] 42 U.S.C. § 1396 et seq. (1970 ed. and Supp V).
[68] 432 U.S. at 441.
[69] Id. at 444–46.
[70] 432 U.S. 464 (1977).
[71] Id. at 471.

> it has imposed no restriction on access to abortions that was not already there.[72]

In support of its holding, the Court emphasized that it was not retreating from its holding in *Roe* and its progeny, but that

> [t]here is a basic difference between direct state interference with protected activity and state encouragement of an alternative activity consonant with legislative policy . . . [A] State is not required to show a compelling interest for its policy choice to favor normal childbirth.[73]

Although the State did not have a similar requirement of a showing of medical necessity for other medical procedures, the Court upheld the validity of the distinction, since such procedures "do not involve the termination of a potential human life."[74]

In a decision issued on the same day as *Beal* and *Maher*, the Court, in *Poelker* v. *Doe*,[75] gave consideration to the refusal by the City of St. Louis to provide publicly financed hospital services for non-therapeutic abortions. Finding the constitutional principle involved to be identical with that involved in *Maher*, the Court found no constitutional violation by the City in electing, as a matter of policy, to provide public hospital services for childbirth while denying such services for non-therapeutic abortions.

The Court returned to the matter of State statutes which impose a standard of care on persons performing an abortion in *Colautti* v. *Franklin*.[76] A Pennsylvania statute required that every person who performs an abortion make a determination of whether or not the fetus is viable and, upon a finding of actual or possible viability, exercise the same duty of care to preserve the fetus' life and health as if the fetus had been intended to be born alive. The statute also required the use of the abortion technique most conducive to the fetus being born alive so long as a different technique is not necessary to preserve the mother's life or health.

The Court found the viability determination requirement of the statute to be constitutionally void for vagueness.[77] It found a double ambiguity in the statute. The first ambiguity was found to flow from the statute's requirement that the prescribed standard of care be applied where there is "sufficient reason to believe that the fetus may be viable." This phraseology, the Court found, left unclear whether the determining factor was to be the physician's subjective judgment or "the perspective of a cross section of the medical community or a panel of experts."[78] The second ambiguity stemmed from the statute's use of the phrase "may be viable." The Court found that it could not merely mean "viable" since the statute used that term in juxtaposition to "may be viable". If one term ("viable" or "may be viable") meant "viable" as the term was used in *Roe* v. *Wade*, the Court felt, the other term could be construed to relate to some other indeterminate stage of fetal development.[79] These uncertainties, the Court felt, left the physician subject to potential criminal liability predicated on "confusing and ambiguous criteria." [80]

---

[72] Id. at 474.

[73] Id. at 475, 477.

[74] Id. at 480.

[75] 432 U.S. 519 (1977).

[76] 439 U.S. 379 (1979).

[77] Id. at 390. The relevant portion of the statute provided that every person who performs an abortion shall determine, "based on his experience, judgment or professional competence that the fetus is not viable," and required efforts to preserve the fetus' life and health "if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable. . . ." Id. at 381 n. 1.

[78] Id. at 391.

The Court also held the standard-of-care provision itself to be impermissibly vague.[81] The defect was found to flow from the provision's failure to make clear which interest is dominant, that of the mother or that of the fetus, or whether the physician is required to make a "trade-off" between the two interests. Such a conflict of duties, the Court felt, requires the State to proceed with greater precision.[82]

Bellotti v. *Baird* ("Bellotti II") [83] returned to the Court in 1979. On the basis of rulings by the Supreme Judicial Court of Massachusetts construing various aspects of the statute, the Court found the statute to be unduly burdensome to the right to seek an abortion and, therefore, unconstitutional. Four of the Justices were of the opinion that if a State decides to require parental consent for a minor's abortion decision, it must, in order to ensure that the requirement for parental consent does not in fact confer on the parents an "absolute, and possibly arbitrary veto," also make available an alternative judicial procedure whereby authorization may be obtained.[84] The Massachusetts statute, as construed by the State's highest court, failed, they held, to meet these requisites in two respects: (1) by virtue of its requirement that in all events the minor seek parental consent [85] and (2) to the extent it allowed the State court to disregard the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made based upon its own assessment of the best interests of the minor.[86] With respect to the first defect, the minor must have, the Justices felt, the opportunity to go directly to court without first consulting or notifying her parents, and the court must authorize her to act without parental consultation or consent if it finds her mature and well-informed enough to intelligently make the decision to abort.[87] If it finds her not to be competent to make such decision independently, she must nevertheless be permitted to show that an abortion would be in her best interests, and if the court is persuaded, it must order the abortion.[88]

---

[79] Id. at 392–93.

[80] Id. at 394. The Court also found the vagueness of the determination requirement to be compounded by the absence in the statute of a scienter element, a culpable mental state. Id. at 394–96. The Court left open the question of whether under "a properly drafted statute," a finding of bad faith or some other type of scienter would be required before a physician would be held criminally liable.

[81] Id. at 397–401. The relevant portion of the statute required the physician "to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born . . . and the abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother." Id. at 398.

[82] Id. at 400–01.

[83] 443 U.S. 622 (1979). See pp. 14–15 supra.

[84] Id. at 643–44.

[85] Id. at 646–48.

[86] Id. at 649–50.

[87] Id. at 647.

[88] Id. at 647–48. Four of the remaining Justices concurred in the Court's judgment but felt that the case, in light of the interpretation of the statute by the Supreme Judicial Court of Massachusetts, was indistinguishable from, and governed by, *Danforth*. They felt the statute should simply be held unconstitutional without any attempt to "address the constitutionality of an abortion statute that Massachusetts has not enacted." Id. at 656.

The Court turned again to the issue of abortion funding in 1980 in the companion cases of *Harris* v. *McRae*[89] and *Williams* v. *Zbaraz*.[90] *Harris* involved challenges to the continuing prohibitions by Congress (usually referred to as the "Hyde Amendment") since 1976 to the use of Federal funds to reimburse the cost of abortion under the Medicaid program except in certain specified circumstances.[91] Several pregnant women and others challenged the Hyde Amendment as violative of the Due Process Clause of the Fifth Amendment and the Religion Clauses of the First Amendment of the Constitution. It was also contended that despite the Federal funding restriction, the States were required under their Medicaid programs to pay for all medically necessary abortions.

The Court looked first to its holding in *Maher* v. *Roe*, and concluded that the funding restrictions of the Hyde Amendment did not impinge upon the freedom of a woman to decide to terminate her pregnancy.[92] The Court was unmoved by an attempt to distinguish the holding in *Maher* on the ground that the case dealt with a refusal by the State to pay for non-therapeutic abortions, whereas the Hyde Amendment extended the denial of the use of Federal funds to therapeutic abortions also. After reexamining the health interest of the woman which served as a basis for the abortional freedom recognized in *Roe* v. *Wade*, the Court nevertheless stated that

> it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[93]

The Court also rejected the argument that the Hyde Amendment contravenes the Religion Clauses of the First Amendment. The appellees asserted that the Hyde Amendment incorporated doctrines of the Roman Catholic Church concerning the sinfulness of abortion, in violation of the Establishment Clause. In response, the Court stated that

> it does not follow that a statute violates the Establishment Clause because it "happens to coincide or harmonize with the tenets of some or all religions."[94]

Finally, the Court rejected the argument that the Hyde Amendment violated the equal protection component of the Fifth Amendment by making Federal reimbursement available under Medicaid for medically necessary services generally but not for medically necessary abortions. Citing *Maher*, the Court could find no suspect classification by virtue of the statute's effect on the indigent; further, it found the statute to be rationally related to the Government's legitimate interest in protecting the "potential life of the fetus."[95] On this analysis, the Court could find no constitutional infirmity with the Hyde Amendment.

---

[89] 100 S. Ct. 2671 (1980).

[90] 100 S. Ct. 2694 (1980).

[91] Under the version before the Court in *Harris*, Public Law 96-123, § 109, 93 Stat. 926, none of the funds appropriated thereunder for fiscal year 1980 were to be used to perform abortions "except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service."

[92] Id. at 2685–87.

[93] Id. at 2688.

[94] Id. at 2689, citing *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961).

[95] Id. at 2691–92.

Williams v. *Zbaraz*,[96] the companion case to *Harris*, dealt with an Illinois statute which prohibited State medical assistance payments for all abortions except those necessary to save the life of the pregnant woman. The Court found the case to be fully governed by the principles enunciated in *Harris* v. *McRae*, and thus held that such a State enactment was not in violation of the Fourteenth Amendment.[97]

The Court's most recent decision in the abortion area came in 1981 in *H.L.* v. *Matheson*,[98] another case involving the issue of parental notification for the abortion of a minor. The Utah statute at issue required, in relevant part, that the physician "notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor." [99]

The Court limited its consideration of the issues to the effect of the statute upon minor daughters who (a) were living with and dependent upon their parents, (b) were not emancipated by marriage or otherwise, and (c) have not made a claim or showing as to their maturity or relations with their parents.[100] Reiterating the rule enunciated in *Bellotti II* "that a State may not constitutionally legislate a blanket, unreviewable power of parents to veto their daughter's abortion," the Court nevertheless held that a "mere requirement of parental notice" would not violate the constitutional rights of the minor if she were immature and dependent.[101] The Court grounded this ruling in "the important considerations of family integrity and protecting adolescents," as well as the State's significant interest in "providing an opportunity for parents to supply essential medical and other information to a physician." [102] Looking again to the State's interest in encouraging childbirth, the Court found no deficiency in the statute by virtue of its disparate treatment of minors who elect to carry the child to term as compared with those who choose to abort; and the Court found no valid basis for voiding the statute simply because it might inhibit some minors from seeking abortions.[103] Accordingly, as applied to the extremely narrow class before it, i.e., of unemancipated minors who are dependent upon and living with their parents, and who have made no claim or showing as to maturity or relations with parents militating against notification, the Court upheld the Utah statute.[104]

Thus, as shown by this brief survey of the progeny of *Roe* v. *Wade*, the Court's treatment of the right of abortion which it promulgated in *Roe* has been essentially one of reaffirmation and extension of that right, and of protection of it from virtually all possible competing interests, private or public. Covering as they do almost a decade of carefully considered opinions dealing with every possible aspect of the matter, it is clear that these opinions evince a firm and unequivocal commitment by the Court to continued recognition and protection of a right to abortion. Thus, so far as the courts are concerned, such right has now become an indelible part of the fundamental law of the land.

---

[96] 100 S. Ct. at 2694 (1980).

[97] Id. at 2700–01.

[98] 101 S. Ct. 1164 (1981).

[99] Id. at 1166–67.

[100] Id. at 1169–70. The Court ruled that appellant had no standing to challenge the statute with respect to its effect on the broader class of mature and emancipated minors, since no allegation or showing had been made that there were such members in the class which she purported to represent. Id.

[101] Id. at 1171.

[102] Id. at 1172.

[103] Id. at 1173.

[104] Id. Two of the six Justices (Justices Powell and Stewart) supporting the Court's decision made clear their understanding that the Court's opinion left open the question whether such a statute would burden the rights of a mature minor or a minor whose best interests would not be served by parental notification. Id. at 1173–77. Still another of the Justices (Justice Stevens) supporting the decision expressed the view that such a parental notification statute could properly be extended to mature or emancipated minors. Id. at 1177–79.

VI. Legal Context of *Roe*

The Supreme Court's decision in *Roe* v. *Wade* should be viewed in its proper legal and historical context. The Court's sweeping decision resulting in abortion-on-demand is clearly in opposition to the treatment of abortion at common law, early American abortion laws, laws enacted by the legislative bodies of the States at the time of the decision, and even the abortion laws of most other countries of the world.

ABORTION AT COMMON LAW

After reviewing the development of abortion as a crime at common law, relying heavily on the analysis of Professor Cyril H. Means, an advocate of legalized abortion, the majority in *Roe* concluded:

> It is thus apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.[105]

The Court's treatment of the development of abortion as a crime at common law has been severely and repeatedly criticized for both its conclusions and its uncritical acceptance of the common law analysis of Professor Means.[106] It is not necessary for the purposes of this report to engage in an exhaustive analysis of the treatment of abortion as a crime at common law. It is enough simply to point out that the majority's sweeping decision in *Roe* was clearly contrary to the way abortion was viewed at common law, with respect not only to maternal health but also to the protection of the life of the fetus.

In the early 13th century, Bracton wrote that abortion by blow or poison was homicide if the fetus was "already formed and animated, and particularly if it be animated." [107] Another authority later in that century, Fleta, also condemned abortion of a "formed and animated" fetus as homicide.[108] At that time, biologists taught that a new life came into being when the fetus assumed recognizable human form, which was thought to occur forty days after conception.[109]

A difficulty encountered with the abortion crime at common law was the impossibility of proving the cause of the child's death. This severe evidentiary problem led to a paucity of indictments for abortion and led some 16th century writers to conclude that, as a practical matter, abortion was not a crime.[110] Seventeenth century abortion reform tried to resolve the proof problem by declaring that an abortion was murder if the child was born alive with marks of the abortion and then died. If the child was stillborn, there was no murder because it could not be known "whether the child was living at the time of the batterie or not, or if the batterie was the cause of the death . . ." [111]

---

[105] 410 U.S. at 140.

[106] See e.g., Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 FORDHAM L. REV. 807 (1973) [Hereinafter cited as "Byrn."]; Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 CALIF. L. REV. 1250 (1975). [Hereinafter cited as "Destro".]

[107] 2. H. Bracton, De Legibus et Consuetudinibus Angliae 279 (Twiss ed. 1879).

[108] See Quay, "Justifiable Abortion—Medical and Legal Foundations," 49 GEO. L.J. 395, 431 (1961). [Hereinafter cited as "Quay."]

[109] See Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality," 14 N.Y.L.F. 411, 411–12 (1968).

Coke attempted, later in the 17th century, to resolve the problem further, and, in so doing, again indicated the concern the common law attached to the life of the fetus—a concern which *Roe* totally abandoned:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.[112]

The majority in *Roe*, relying on Professor Means' interpretation of the sketchy reports of two cases from 1327 and 1348 (three centuries before Coke wrote), suggested that Coke was either mistaken or intentionally misstated the status of abortion as a common law crime.[113] Other commentators such as Byrn and Destro strongly dispute Means' analysis of those cases and suggest that the cases stand for the opposite conclusion. The great common law scholars clearly indicated that abortion was a crime with respect, at the very least, to a quick fetus. Blackstone stated:

> Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter . . . But (Coke) doth not look upon this offence in quite so atrocious a light but merely as a heinous misdemeanor.[114]

Finally, as Blackstone indicated, the common law recognized the life of the fetus at the time of quickening. The first English abortion statute, recognizing this understanding of human generation, provided for greater penalties for an abortion of a woman "quick with child" than a woman "not being, or not being proved to be, quick with child." [115] This statute was changed by a new statute, enacted in 1837, which imposed a penalty for all abortional acts without distinction.[116] A possible motive for this change was the discovery of the ovum, and thus a more accurate idea of the nature of conception, in 1827.

---

[110] See Davies, "Child Killing in English Law," 1 MODERN L. REV. 203 (1937).

[111] *R.* v. *Sims*, 75 Eng. Rep. 1075 (K.B. 1601).

[112] E. Coke, Third Institute 50 (1644).

[113] 410 U.S. at 134.

[114] 1. W. Blackstone, Commentaries *129–130. "Quickening" of the fetus is defined as the "first motion . . . in the womb felt by the mother." This occurs normally "about the middle of the term of pregnancy." Black's Law Dictionary, 5th Ed. (1979) at 1122.

[115] 43 Geo. 3 ch. 58, § 2 (1803).

[116] 7 Will. 4 & 1 Vict., c. 85 (1837).

The decision in *Roe*, which, as discussed previously, eliminated any consideration for the life of the fetus, was clearly contrary to the thrust of the common law understanding of abortion.

19TH CENTURY AMERICAN ABORTION LAW

The abortion law in effect in this country, in most States, until the mid-19th century was derived from the English common law.[117] While the vast majority of the States retained the common law distinction that abortion before quickening was not a crime, no State held that there was no crime of abortion after quickening.[118] Later in the 19th century, several States interpreted the common law to mean that abortion was a crime at any time during pregnancy.[119]

Almost all of the States enacted abortion statutes during the 19th century.[120] Connecticut adopted the first State abortion statute in 1821.[121] The Connecticut statute retained the quickening distinction for the abortion crime. Quickening, however, soon began to disappear as the practical distinction to determine criminality. The intention behind enactment of these statutes is illustrated by the Maine Supreme Court which, in interpreting the Maine statute, abrogated the quickening requirement in the abortion crime; the court pointed out that if the pleading did not allege the destruction of the child, it would be fatally defective for not charging the essential element of the crime.[122]

In 1859, the American Medical Association Committee on Criminal Abortion criticized the quickening distinction in criminal abortion laws for the "grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being," and called upon State legislatures to revise their abortion laws.[123] This position of the AMA seems to have had its impact because during this period many States abolished the requirement that an abortion had to follow quickening to be a crime. At the time of the ratification of the Fourteenth Amendment, in 1868, at least 28 of the 37 States had made abortions before quickening a crime.[124] In the next 15 years, seven more of these States incriminated pre-quickening abortional acts. By 1871, the AMA could quote with approval from *Archbold's Criminal Practice and Pleadings* with regard to the new consensus:

> It was generally supposed that the foetus becomes animated at the period of quickening; but this idea is exploded. Physiology considers the foetus as much a living being immediately after conception as at any other time before delivery, and its future progress as the development and increase of those constituent principles which it then received. It considers quickening as a mere adventitious event . . . Indeed, no other doctrine appears to be consonant with reason or

---

[117] 410 U.S. at 138. While this general statement is true, the Court's analysis ignored abortion restrictions in the laws regulating midwifery which some colonies had enacted as early as 1716. See infra, note 133.

[118] Byrn at 827.

[119] E.g., *Mills* v. *Commonwealth*, 13 Pa. 630 (1850).

[120] See 410 U.S. at 175–76 notes 1 & 2 (dissenting opinion).

[121] CONN. STAT. Tit. 20, § 14 (1821).

[122] *State* v. *Smith*, 33 Me. 48, 60 (1851) (the statute was enacted in 1840).

[123] 12 Transactions of the Am. Med. Assn. 73–78 (1859).

[124] Quay at 447–520.

> physiology but that which admits the embryo to possess vitality from the very moment of conception.[125]

Further evidence that at least one motivation behind these laws was the protection of the life of the fetus, is seen in several court decisions interpreting these statutes.

> We hold that the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and through it society.[126]

Thus, again, the Court's decision in *Roe*, resulting in a practical situation of abortion-on-demand, was clearly contrary to the early American law on abortion.

STATE ABORTION LAWS AT THE TIME OF ROE

The Supreme Court's decision in *Roe* held every State's criminal abortion statute unconstitutional.[127]

Between 1967 and 1972, most of the State legislatures had considered changing their abortion laws. Nineteen States did make changes in their abortion law.[128] All of these 19 States changed their law to permit abortion to prevent grave health damage to the mother. In addition, some of the States permitted abortions when the unborn child was conceived in rape or incest, or where the child would be born with substantial deformity. Four States required no grounds at all. But all States limited abortions in terms of age of the fetus; for example, Washington had a limit of four lunar months.

The other 31 States did not change their abortion law despite the fact that abortion legislation was introduced in most of them. In two States, Michigan and North Dakota, proposed liberalized abortion statutes were rejected by referendum—by majorities of 61% and 77% respectively. In 21 of the States, the abortion statutes in effect in 1868 (the year the Fourteenth Amendment was ratified) were still in effect at the time of the *Roe* decision.[129]

In sum, no State—including the four States which allowed abortion on demand—made abortion legal for the entire nine months. None of the States had abortion laws as expansive as that created by the Court in *Roe* v. *Wade*.

INTERNATIONAL ABORTION LAW

Not only was the Court's creation of an abortion right more permissive than the law that had been enacted by the representatives of the people of the fifty States, but the abortion right found in *Roe* was one of the most permissive in the world.

In 1981, according to one study, the United States was one of 7% of the countries of the world in which something approximating abortion-on-demand was legal.[130] But the current status of abortion in the

---

[125] D. A. O'Donnell and W. L. Atlee, "Report on Criminal Abortion," 22 Transactions of the Am. Med. Assn. 250 (1871).

[126] *Bowlan* v. *Lunsford*, 176 Okla. 115 (1936).

[127] 410 U.S. at 118, note 2.

[128] Young, "A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems," 1972 Univ. of Illinois L.F. 177.

[129] 410 U.S. at 176 note 2 (dissenting opinion).

[130] Tietze, Induced Abortion: A World Review (1981) (The Population Council).

United States may be more extreme than that figure indicates since many of the other countries in that category have enforceable time limits on the legal availability of abortions. Other countries in this category include the USSR, the People's Republic of China, Denmark, France, Singapore, Sweden, Yugoslavia, and Vietnam. The vast majority of countries of the world have at least some effective legal control over the performing of abortions. As Professor Richard Stith has observed about *Roe v. Wade*,

> As a teacher of comparative law, I find this decision unique in the world. No other modern domestic state or foreign nation has ever, to my knowledge, privatized the value of new human life to this degree. No one, except our Court has ever left the unborn entirely without public protection for the first six months of gestation, and with only nominal protection even just before birth. Moreover, this extremist position has been imposed on our country not as a matter of temporary legislative experimentation, but by practically unchangeable judicial fiat—and this with scarcely any principled basis in the Constitution.[130.1]

Indeed, the single judicial decision in Western law which is most directly comparable to *Roe* in terms of the issues presented has come to almost diametrically opposite conclusions. In 1975, the Federal Constitutional Court of West Germany handed down its own decision on abortion, in which the majority opinion of the court (a) accepted as fact the position that human life exists at least within a few days after conception, (b) rejected the view that this life could legitimately be classified as having little or no value under the law, and (c) invalidated as unconstitutional a policy of unrestricted abortion during the first three months of pregnancy.[131]

Thus, it can be seen that the Court's decision in *Roe* v. *Wade* had a devastating impact on existing law. This far-reaching decision was clearly contrary to at least part of the purpose behind the treatment of abortion as a crime at common law and the development of 19th century abortion law in America. The abortion right found in *Roe* was broader than any existing State abortion law, and, finally, was one of the most permissive, if not the most permissive, in the world.

VII. JURISPRUDENCE OF *ROE*

The protection of human life is the foremost duty of government. The Declaration of Independence asserts that all men are endowed with an inalienable right to life, and that it is in order to secure this right that governments are instituted among men. Honoring this commitment, the Constitution provides in both the Fifth and Fourteenth Amendments that no person may be deprived of life without due process of law.

As a result of new scientific evidence offered to them during the 19th century relating to the nature of human reproduction, legislatures of the several States recognized the biologically human nature of the

---

[130.1] Senate hearings, November 12, 1981, Professor Richard Stith, Valparaiso University School of Law.

[131] See generally, Robert Jonas and John Gorby, "West German Abortion Decision: A Contrast to *Roe* v. *Wade*," 9 JOHN MARSHALL J. PRACTICE & PROCEDURE (1976).

human fetus throughout pregnancy,[132] and eradicated the common law distinction between the "quickened" and "unquickened" fetus. These legislatures thus adopted criminal laws prohibiting the performance of abortion throughout the term of pregnancy.[133] These abortion laws, enacted in the same era as the ratification of the Fourteenth Amendment to the United States Constitution, acted, as with that Amendment, to affirm Thomas Jefferson's exhortation that "[t]he care of human life and happiness, and not their destruction, is the first and only legitimate object of good government."[134]

Since the decision of the Supreme Court in *Roe* v. *Wade*, however, the Congress and the States have been stripped of power to protect prenatal human life. Careful scrutiny of this decision by leading constitutional scholars such as Archibald Cox, John Hart Ely and Richard A. Epstein makes it quite clear that the fault of *Roe* v. *Wade* lies not in the Constitution but in the Supreme Court's interpretation of it. Three principal themes emerge from the criticisms leveled against *Roe*: that the right to abortion proclaimed by *Roe* has little or no basis in the Constitution; that the Court provides little or no reasoned basis for its conclusion that prenatal life is beyond the power of the State to protect; and that *Roe* represents an extreme example of constitutional jurisprudence by which the judiciary assumed the role of a "super-legislature," imposing its view of wise public policy under the guise of constitutional interpretation.

BASIS IN CONSTITUTIONAL LAW

The first charge levied by scholars against *Roe* v. *Wade* is that, in the words of Professor John Hart Ely, *Roe* is

> a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be.[135]

Professor Archibald Cox echoes this opinion when he asserts that

> neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of either natural law or the Constitution.[136]

It is important to note as well what these scholars are *not* saying. They are not criticizing the Court for taking a controversial position on a sensitive issue, nor are they disputing the morality of legalized abortion. As a necessary consequence of its position in the legal system, the Supreme Court is often confronted with difficult questions in the context of legal dispute. In the words of Professor Ely, these "difficult questions yield controversial answers." [137] In most cases, however, the Constitution provides some guidance for the proper resolution of even the most controversial of these decisions. For example, the Fourth Amendment guarantees to all citizens, the innocent and guilty alike, freedom from unreasonable searches and seizures. This overriding value leads to controversial decisions involving restraints on police officers in the apprehension of criminals. While all may not agree with the Court's particular application of the Fourth Amendment, Professor Ely points out, one cannot easily make the claim that the Court's decision lacks any foundation in the Constitution.[138]

---

[132] Destro, at 1278–80, 1289–90. As Professor Charles Rice has noted, at the time of the ratification of the Constitution, "the scientific facts of life in the womb were not clearly known." Rice, "The Dred Scott Case of the Twentieth Century," 10 Hous. L. Rev. 1059, 1069 (1973). [Hereinafter cited as "Rice."]

[133] Id. at 1276–80. See *Gray* v. *State*, 77 Tex. Crim. 221, 224, 178 S.W. 337, 338 (1915) (construing abortion statute to abrogate the common-law quickening distinction). See also Me. Rev. Stat. c. 160, 13–14 (1840); Conn. Stat. tit. 22, 14, 16 (1821), amended by Conn. Pub. Acts, ch. 71–1 (1860). Both of these statutes abrogated the common law doctrine that held abortion to be unlawful only in the case of a "quickened" fetus. According to Destro, the history of the Connecticut statute, the Nation's first abortion law, "reveals that as medical knowledge of the unborn progressed, so did the protective ambit of the statute." Destro at 1276, n. 115, 121 and 1279–80.

In colonial times and into the nineteenth century, matters of reproductive health were dealt with by midwives, not physicians. As early as 1716, the Common Council of New York City enacted a law regulating the practice of midwifery, a law which strictly prohibited the administration of abortifacients and the performance of abortions. See Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in Hilgers et al. (ed.), New Perspectives on Human Abortion (1981). [Hereinafter cited as "New Perspectives."]

[134] Speech to the Republican Citizens of Washington County, Maryland (March 31, 1809), reprinted in J. Bartlett, Familiar Quotations 472–73 (14th ed. 1968).

[135] Ely, "The Wages of Crying Wolf," 82 Yale L. J. 920, 947 (1973). [Hereinafter cited as "Ely."]

[136] A. Cox, The Role of the Supreme Court in American Government 114 (1976).

In the case of *Roe* v. *Wade*, however, the claim is entirely justified, for the Constitution "simply says nothing, clear or fuzzy, about abortion." [139] Nor is there any support whatever in the legislative history of the Constitution to warrant the conclusion that it was intended to secure a "right to an abortion." [140]

The Court's purported "history of abortion regulation" [141] likewise offers no support for the finding within the Fourteenth Amendment of a right to abortion. As Professor Richard A. Epstein has explained, "neither the mass nor the antiquity of the sources cited by the Court can conceal their essential irrelevance to the constitutional inquiry" on abortion.[142] The only aspect of history that would have been relevant to the Court's task is a history of the genesis, purpose and adoption of the Fourteenth Amendment. But as Dean Joseph O'Meara has pointed out, *Roe* v. *Wade* contains "not a syllable" on this important question.[143]

Nevertheless, *Roe* declares that the Due Process Clause of the Fourteenth Amendment confers a right of privacy which includes the right of a woman to abort her offspring if she so chooses. Nowhere in the decision does the Court define the right of privacy; its only discussion of the subject is an assertion that the Constitution does not confer "an unlimited right to do with one's body as one pleases." [144] Yet if the right of privacy does not entitle one to do with one's *own* body what one pleases, how can it be said to protect activity that ends the life of another member of the human species? Even if the human fetus is not a person in the whole sense of the law, Ely emphasizes, "it is certainly not nothing." [145] Ely's aphorism illustrates an essential truth that should have been obvious to the Court—that "there is nothing private about an abortion." [146]

Although the right of privacy is not mentioned in the text of the Constitution, many legal scholars would agree that the courts may find such a right in the general values which certain specific provisions of the Constitution aim to protect. However, these scholars also stress that the right of privacy must be carefully defined and limited; thus, Professor Ely writes that it is entirely proper for a court to infer a general right of privacy, "*so long as some care is taken in defining the sort of right the inference will support.*" [147]

---

[137] Ely at 927.
[138] Id.
[139] Id.
[140] Id. at 939.
[141] 410 U.S. 113, 129–152.
[142] Epstein, "Substantive Due Process By Any Other Name," 1973 SUP. CT. REV. 159, 167. [Hereinafter cited as "Epstein".]
[143] O'Meara, "Abortion: The Court Decides A Non-Case," 1974 SUP. CT. REV. 337, 352. [Hereinafter cited as "O'Meara".]
[144] 410 U.S. at 153.
[145] Ely at 931.
[146] O Meara at 340.

Roe, however, provides neither a definition for the right to privacy nor an explanation of how that right is implicated by restrictions upon abortion. Rather, the Court simply declares that the right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." [148] Apparently, the Court thinks that this outcome is supported by the detriment imposed upon the pregnant woman by statutes which prohibit her from aborting her child. As Professor Ely notes, these detriments "ought to be taken very seriously." But, he adds, all this "has nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests." [149] Whatever one's philosophical views on the issue, it is generally agreed that the Constitution does not provide such an unrestricted "right to privacy." [150]

THE LIFE AND PERSONHOOD OF THE HUMAN FETUS

The discussion in *Roe* v. *Wade* of the physiological and legal status of the fetus is the most confusing portion of the opinion. The question of when life begins, the Court says, is beyond the competence of the judiciary to answer.[151] Nevertheless, the Court effectively answers that question for the legislatures and citizens of 50 States, declaring that the States may only protect unborn life after "viability." In the United States, therefore, human life—in the sense of an individual whose rights may be protected by the community—as a practical matter does not begin until at least the seventh month of pregnancy. Indeed, all existence prior to live birth is here given the status of, at most, "potential" life; and *Doe* v. *Bolton* has established that the "potential" life of even a viable unborn child cannot be regarded as comparable under the law to the emotional or social "health" of his or her mother.[152]

The Court's conclusion in this regard does not follow from any of the discussion in its opinion. That discussion attempts to answer three questions, and concludes: (1) that the unborn are not "persons" as that word is used in the Fourteenth Amendment of the United States

---

[147] Ely at 929 (emphasis in original). The right of privacy has been developed in several Supreme Court decisions to protect the autonomy of the family, and later, the individual, in matters of childrearing, procreation and contraception. See *Meyer* v. *Nebraska*, 262 U.S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Griswold* v. *Connecticut*, 381 U.S. 469 (1965). Several commentators favorable to *Roe* v. *Wade* have remarked that *Roe* represents a maternal extension of the doctrine of familial privacy. See, e.g., Hemmann and Barzelay, "The Forest and the Trees: *Roe* v. *Wade* and Its Critics." 53 B.U.L. REV. 765 (1973); Note, "Roe v. Wade. Its Impact On Rights of Choice in Human Reproduction." 5 COL. H. RTS. L. REV. 497 (1973); Note, "In Defense of Liberty: A Look at the Abortion Decision," 61 GEO. L.J., 1559 (1973). But as one authority pointed out,

> No elaborate discussion is required to expose the glaring non sequitur in the Court's argument. Plainly the fact that some family matters are constitutionally protected does not demonstrate that abortion is constitutionally protected. Nor does the added fact that abortion laws disadvantage pregnant women establish their invalidity. Legal restrictions are placed on family autonomy in fields ranging from divorce to euthanasia despite the heavy costs thereby exacted from the individuals concerned.

Vieira, "Roe and Doe: Substantive Due Process and the Right of Abortion," 25 HASTINGS L.J. 867, 873 (1974).

[148] 410 U.S. at 153.

[149] Ely at 932.

[150] Id.

[151] 410 U.S. at 159.

[152] 410 U.S. 179, 192. See supra text at notes 26–7.

Constitution;[153] (2) that under the common law, the unborn are not "persons in the whole sense";[154] and (3) that the question of when human life begins has been a matter of great controversy among theologians and philosophers with no consensus among them.[155] Consideration of each of these questions is necessary to demonstrate how the Court erred in addressing them, and to illustrate their inconclusiveness with respect to the question of whether the State may act to protect the human fetus.

Fourteenth Amendment Personhood

The Court offers two reasons for concluding "that the word 'person' as used in the Fourteenth Amendment does not include the unborn": (1) that uses of "person" elsewhere in the Constitution do not have a prenatal application;[156] and (2) that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today."[157]

The first reason is unpersuasive because in none of the clauses cited by the Court does the Constitution attempt to define what a "person" is. Rather, these provisions—which include the eligibility requirements for Federal office, the apportionment of representatives, the Extradition and Fugitive Slave Clauses of Article IV—act only to restrict for particular purposes a broad class of persons. For example, a person must be 25 to be a Representative, 30 to be a Senator, and 35 to be the President.[158] These clauses, as Professor John D. Gorby has explained, "suggest only that there are persons, 24 years of age and younger, who are not qualified for the House, Senate or Presidency."[159] They do *not* imply that those less than 24 years of age are non-persons, nor do they suggest when 24-year-olds become persons, nor do they suggest that they have become persons at birth or at any other particular stage of their development. Professor Gorby added that the other provisions cited by the Court are similarly irrelevant on this issue.[160] The Court's essay on this subject offers nothing to support the conclusion that "person" in the Fourteenth Amendment applies only post-natally.

The Court also suggests that no case has specifically held the unborn to be persons under the Fourteenth Amendment.[161] All this proves is a fact already known to all observers of *Roe* v. *Wade*: that the question of the constitutional status of the unborn was before the Supreme Court for the first time.[162] Moreover, as Professor Dellapenna notes,

---

[153] 410 U.S. at 158.

[154] 410 U.S. at 162.

[155] 410 U.S. at 159–160.

[156] 410 U.S. at 157.

[157] 410 U.S. at 158.

[158] See Gorby, "The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood,' and The Supreme Court's Birth Requirement," 1979 So. Ill. L. Rev. 1, 11–12. [Hereinafter cited as "Gorby".]

[159] Id. at 12.

[160] Id. On this method of judicial construction, cf. J. Story, Commentaries on the Constitution of the United States, § 454 (1833); T. Cooley, A Treatise on the Constitutional Limitations 62 (1868).

[161] 410 U.S. at 158.

[162] Two Federal district courts in cases which led up to *Roe* held that the unborn were not persons under the Fourteenth Amendment. *See McGarry* v. *Magee-Women's Hospital*, 340 F.Supp. 751 (W.D. Pa. 1972); *Abele* v. *Markle*, 351 F.Supp. 224 (D. Conn. 1972). Cf., however, *Steinberg* v. *Brown* in which the U.S. District Court for the Northern District of Ohio stated, "Biologically, when the spermatozoon penetrates and fertilizes the ovum, the result is the creation of a new organism which conforms to the definition of life. Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the State the duty of safeguarding it." 321 F.Supp., 741, 746–7 (1970). The Court in *Roe* was plainly wrong in its absolute statement. *Roe* was the first case to squarely present the issue of the constitutional rights of the unborn before the Supreme Court. On the subject of personhood in the legal and other senses, see generally the testimony of Professor Germain Grisez. Professor, Mount Saint Mary's College, Senate hearings, November 5, 1981. See also the outstanding work by Professor Grisez, Abortion: The Myths, the Realities, and the Arguments (1970) for a fuller discussion of these and other issues related to abortion.

> it is difficult to visualize another context in which the question of fetal personhood could be presented. One hundred and five years without such a question being decided is not surprising when one recalls that minors were first held protected by that amendment in 1967.[163]

Thus, the Court effectively dodged the issue of fetal personhood by citing a lack of controlling precedent. The failure to address the question more fully is difficult to rationalize if, as the Court opined, the appellant's case would collapse if the unborn were held to be persons.

Finally, there is ample reason to believe that the Court's assertion of the relative availability of legal abortion during the 19th century is simply not accurate. Leading authorities are in agreement that it was a common law crime to administer any drug or perform any operation for the purpose of causing a miscarriage unless such operation were necessary to save the life of the woman.[164] During the 19th century Americans gradually codified and strengthened the common law prohibition of abortion,[165] and as Justice Rehnquist noted in his dissenting opinion, at the time of the adoption of the Fourteenth Amendment in 1868, "there were at least 36 laws enacted by state or territorial legislatures limiting abortion." [166] At least 19 of these had been passed by 1850. Nevertheless, the Court "observ[ed] . . . that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today." [167] As Professor Gorby concludes, if Justice Blackmun meant by this cryptic statement "that abortion was neither criminal nor subject to penal sanction—either by statute or at common law—he was wrong." [168]

With respect to the Court's denial of constitutional rights to the unborn, Professor Ely observes that "it is most intriguing" to compare the canons of construction used in reaching this conclusion with those employed in identifying the "right to an abortion" itself.[169] In making the latter holding, the Court clearly employed a high degree of imagination and innovation in construing a never-before-identified "right to an abortion" within the Due Process Clause of the Fourteenth Amendment (and perhaps elsewhere within the Constitution). In making the former conclusion, the Court employed a sort of dogged literalism, in finding that "person" could not possibly have contemplated the inclusion of the unborn.[170] Without taking sides on the appropriate method of judicial construction, this Committee (in agreement with Professor Ely) nevertheless notes that the alternating theories of construction employed by the Court in *Roe* suggest that there may have been something more involved in that decision than purely neutral criteria for constitutional interpretation.

---

[163] Dellapenna, "Nor Piety Nor Wit: The Supreme Court on Abortion," 8 COL. H. R. LAW REV. 379, 400 (1974).

[164] Perkins, Criminal Law 140 (2nd ed., 1969). See generally, Horan, et al., "The Legal Case for the Unborn Child," in Abortion and Social Justice 105 (1972).

[165] Destro, 1278–80.

[166] 410 U.S. at 174–176.

[167] 410 U.S. at 158.

[168] Gorby at 15. If, instead, the Court meant that abortion regulations in the nineteenth century were less restrictive than those of 1973, it was also wrong. Abortion statutes in force in 1973 in at least 21 States were the same as those in effect in 1868. To the extent that other statutes became more restrictive, this occurred in response to the growing awareness of the life of the unborn from the time of conception, that is, that the fetus was "quick" or alive, from that first moment. Many legislatures and jurists were already aware of this. A Pennsylvania court in 1850 wrote: "The moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated." *Mills* v. *Commonwealth*, 13 Pa. 630, 633–34 (1850). The Alabama Court of Appeals, interpreting a statute passed in 1840, wrote: "The statute's manifest purpose is to restrain after conception an unwarranted interference with the course of nature in the propagation and reproduction of human kind. . . . We are forced to concede that when in the red-hot furnace of vitality two germs, male and female, are brought together, that fuse themselves into one, a new being, crowned with humanity and mentality, comes into life. If this be true, does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life. . . .?" *Trent* v. *State*, 15 Ala. App. 485, 486, 73 So. 834, 836 (1916).

[169] Ely at 926. Professor Rice explains that "it is the evident purpose of the Bill of Rights to protect human rights. It would seem to be clearly inconsistent with that aim to hold that a human being can be deprived of the most basic right, the right to live, by the expedient of defining him as a non-person." Rice at 1069.

The Court's holding that the Fourteenth Amendment could not possibly have been intended to protect the unborn may conflict with the plain meaning of the word "person," and quite possibly, with the intent of the Fourteenth Amendment. In order to decide whether an individual is protected under the Fourteenth Amendment, Congressman John Bingham of Ohio, its principal Framer, declared in 1867, "the only question to be asked of the creature claiming its protection is this: Is he a man?"[171] The Court's observations notwithstanding, this question has consistently been answered in the affirmative by American courts and legislatures with regard to the unborn.[172] Thus, in the words of Professor Noonan,

> The Fourteenth Amendment expressly declaring that no State shall "deprive any person of life" without due process of law appeared to guarantee the protection of all human beings. The Supreme Court in a stirring dictum had declared that "one's right to life" depends on the "outcome of no election". The right to life, put beyond electoral caprice, appeared to be secured by the due process clause. No student of language, no one faithful and attentive to the words of the Constitution could have supposed that the very clause which seemed to secure life could be turned inside out to mandate destruction of the States' life-protective measures . . . The Congressmen who proposed and ratified the Fourteenth Amendment approved legislation banning abortion in the federal territories. The State legislatures which ratified the Fourteenth Amendment left in force strict statutes against abortion. How amazed these Congressmen and legislatures

---

[170] See also Gorby at 22–24 and sources cited therein: "Concerning the function of the Fourteenth Amendment and the role of the word 'person' in the amendment, it can be said that the immediate political concern of the second half of the 1860s was to secure rights and freedoms and to ensure equal protection for former slaves. More generally, however, the amendment was designed to secure to all persons the fundamental rights of man, which generally include life, liberty or property, by providing the adjective right of access to the courts. There is nothing in the function of the fourteenth amendment to suggest that its scope or purpose is to protect only the born. And to the extent that an unborn can be the owner of property and is living, a Fourteenth Amendment purpose exists in the case of the unborn just as surely as it does with a born person who owns property and possesses 'life'." Gorby at 24 (footnotes omitted).

[171] Cong. Globe, 40th Cong., 1st Sess. 542 (1867). Congressman Bingham emphasized that the constitutional right to life transcended any statutory protection for human life, or lack thereof. "Bingham stated that, notwithstanding the fact that life had never 'been protected, and is not now protected, in any State of the Union by the statute law of the United States,' such a fact is not determinative of the existence of the right, for it is expressly protected in the Constitution." Destro at 1288, citing Cong. Globe, 39th Cong., 1st Sess. 429 (1865).

[173] In 1850, the Supreme Court of Pennsylvania declared, 'By the well settled and established doctrine of the common law, the civil rights of an infant en ventre sa mere are fully protected at all periods after conception." *Mills* v. *Commonwealth*, 13 Pa. 630, 631 (1850). See, e.g., sources cited in note 133. See also *State* v. *Murphy*, 27 N.J.L. 112, 114 (1858) (the mother's offense in procuring an abortion "at the common law is against the life of the child"); *Smith* v. *State*, 33 Me. 46 (1851). As Destro notes, *Murphy* and *Smith* make it clear that, in abortion statutes passed prior to the Fourteenth Amendment, "the destruction of the unborn child was, itself, the gravamen of the crime of abortion." Destro at 1276. As medicine advanced the knowledge of human embryology and fetology, legislatures passed statutes to protect unborn life both before and after "quickening," thus recognizing the humanity of the unborn throughout the term of pregnancy. See note 133, supra.

> would have been to have been told that the Amendment they adopted could be read to eradicate the criminal laws safeguarding life. From the date of the adoption of the Fourteenth Amendment in 1868 until January 22, 1973, the traditions of the American people assured the protection of life in the womb . . .[173] [Footnotes omitted]

As Professor Ely notes, even if the unborn do not have rights under the Fourteenth Amendment, this is irrelevant to the question of whether a State may restrict abortion, for

> it has never been held or even asserted that the state interest needed to justify forcing a person to refrain from an activity, *whether or not that activity is constitutionally protected*, must implicate either the life or the constitutional rights of another person. Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest.[174]

Thus, the Committee believes that the Court's finding of non-personhood of the unborn was a highly tenuous one. In any event, this finding in no way mandates the Court's conclusion that the States lack any compelling interest in protecting the lives of these unborn.

The common law

The theme of "personhood" was further discussed by the court in its observation that the unborn were not considered "persons in the whole sense" under the common law.[175] This observation is as tenuous as the Court's denial of personhood under the Constitution. The Court simply failed to view the history of restrictions upon abortion in perspective, with abortion first as a violation of canon and common law, then, after the demise of canon law jurisdiction over civil matters, as a common law crime,[176] and as a statutory offense.[177]

The phrase, "persons in the whole sense," is also misleading, for many categories of human beings were not given full rights under the common law—for example, infants, women and slaves. Yet, it does not follow that the common law did not protect the lives of these human beings. The unborn, Professor Epstein notes, were for many purposes regarded as persons by the common law; furthermore, he emphasizes,

> It remains true that recent judicial trends have expanded, not limited, their rights.[178]

For example, the Court

> acknowledged that unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians.[179]

---

[173] Senate hearings, October 5, 1981, Professor John Noonan, University of California School of Law. The quote from the Supreme Court decision is taken from *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) at 638.

[174] Ely at 926.

[175] 410 U.S. at 162.

[176] As Destro points out, however, the common law restrictions upon abortion derived independently and did not originate in canon law. Destro, at 1275, note 110.

[177] See statutes cited in *Roe* v. *Wade*, 410 U.S. at 175 (Rehnquist, J., dissenting).

[178] Epstein at 175.

[179] O'Meara at 355. See e.g., *Burn* v. *New York City Health and Hospitals Corp.*, 31 N.Y. 2d 194, 286 N.E. 2d 2887 (1972) (Guardian ad litem appointed to represent unborn children in abortion litigation.)

In the realm of tort law, the uninterrupted trend of recent decades has been to discard the old rules and to allow the unborn child standing to sue for injuries sustained in utero. Dean Prosser has noted that,

> All writers who have discussed the problem have joined in condemning the old rule, and in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother.[180]

Thus, in terms of development of the law, the Court would have placed itself well within the mainstream by recognizing the legal "personhood" of the unborn. Instead, it chose to go against this mainstream by refusing to recognize the trend of the law's development.

The beginning of human life

It is important to distingush between *Roe* v. *Wade's* holding regarding the personhood of the unborn under the Fourteenth Amendment, and the Court's subsequent discussion of theories on the beginning of human life. On the first question, the Court squarely held that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." [181] This conclusion disposed of any argument that the State might be permitted or obligated under that Amendment to protect the life of the unborn.

The second argument proposed by the State defendants in *Roe* v. *Wade* was that, apart from any duty under the Fourteenth Amendment, the State has a compelling interest in protecting life "from conception." [182] The Court's response here was the now famous declaration:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[183]

The Court, however, did more than speculate as to the answer. Philosophers, theologians and physicians, Professor Epstein notes, "do not have, or pretend to have, the power to decide this question for us all." [184] But, as a practical matter, the Supreme Court exercised such a power in *Roe* v. *Wade*, deciding that only one theory of prenatal life would be reflected in American constitutional law: that life begins at viability, when the fetus "has the capability of meaningful life outside the mother's womb." [185] It is only at this point, fixed elsewhere in the opinion at about 24–28 weeks,[186] that the State may even begin to balance the interest in the life of the fetus against the social or emotional "well being" of the mother. This conclusion rests upon the Court's determination that until birth, "the fetus, at most, represents only the potentiality of life." [187] No other "theory of life," the Court holds, may be adopted by the State to limit the right to abortion.[188]

---

[180] W. Prosser, The Law of Torts 336 (4th ed.).
[181] 410 U.S. at 158.
[182] 410 U.S. at 159.
[183] Id.
[184] Epstein at 176.
[185] 410 U.S. at 163.
[186] Id. at 160.
[187] Id. at 162.
[188] Id. For ways in which the lower Federal courts have further eroded the legal protection of viable fetuses and of children born alive during post-viability abortions, see generally Basile Uddo, "When Judges Blink, Congress Must Not Blink", The Human Life Review, Summer 1979, 42–60.

In considering this conclusion, one looks in vain for any reasoning from constitutional or legal (or scientific) principle. The Court discusses a variety of views which have surfaced in history on the question of when human life begins, and notes that many of these disagreed with the view that life begins at conception.[189] However, as Professor Epstein notes, none of the arguments on this question turn, or can be made to turn, on the language of the Constitution.[190] Thus, he concludes, the Court's declaration that no State may adopt a theory of life which infringes on the availability of abortions prior to the seventh month of pregnancy characterizes *Roe* as an arbitrary decision based on naked political preferences.[191] In effect, the Court decided that the State may only enforce a theory of life that is consistent with the view that life begins at viability.[192] Thus, the Court has indeed decided, for the purposes of the law, when life begins. And it did so on grounds that have no relation to the Court's function in the constitutional system of government. In recommending proposal of the immediate amendment, this Committee takes no position on the question of when human life begins but only a position on the manner in which public debate on this question has been foreclosed by the Court's action.

CONCLUSION

This section has attempted only to portray some flavor of the jurisprudential criticism that has been directed at the *Roe* and *Doe* decisions. In large part, this criticism has come from individuals who do not look with disfavor upon the substantive policies generated by these decisions. They simply question how these policies came suddenly to be mandated by a Constitution that had never been thought prior to 1973 to contain anything approaching the "rights" set forth in *Roe* and *Doe*. As Professor Ely again has observed,

> What is frightening about *Roe* is that this super-protected right [to abortion] is not inferable from the language of the Constitution, the Framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the Nation's governmental struc-

---

[189] 410 U.S. at 160. Several views have persisted on the question of when human life begins, and as the Court correctly notes, "there has always been strong support throughout history for the view that life does not begin until live birth." 410 U.S. at 160. The Court does acknowledge that many physicians and theologians strongly hold the opposing view that life exists from the moment of conception, but attempts to dismiss the importance of this latter position, implying that advances in science pose "substantial problems for a precise definition of this view." 410 U.S. at 167. As was ably demonstrated by the testimony presented on behalf of S. 158 to the Subcommittee on the Separation of Powers, however, those who defend the humanity of the fetus from the time of conception have a variety of compelling biological arguments for their view. Hearings before the Subcommittee on Separation of Powers on the Human Life Bill, 97th Congress, 1st Session.

[190] Epstein at 179.

[191] "[The Court] conceded that the "potential" life of the unborn child must be taken into account in order to make the constitutional rules to govern abortions. But is there not a potential life in the unborn child from the moment of conception? And, if so, how do we take its measure? It makes no sense to hold in conclusionary terms that 'by adopting one theory of life, Texas may [not] override the rights of the pregnant woman that are at stake.' That formulation of the issue begs the important question because it assumes that we know that the woman's rights must prevail even before the required balance takes place. We could as well claim that the Court, by adopting another theory of life, has decided to override the rights of the unborn child which the law of Texas tries to protect. The Justice simply cannot strike the balance . . . unless he has some theory of life of his own which shows that there is no "compelling" interest [in the life] of the unborn child. His exhaustive history of the abortion question indicates quite clearly that there is no consensus on the question, and it is simple fiat and power that gives his position its legal effect." Epstein at 182.

[192] The State's authority under *Roe* to protect unborn life is quite tenuous, however, even after the point of viability. See supra text at notes 26–7.

> ture . . . At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.[193]

As Professor Epstein has similarly concluded, the *Roe* decision is "symptomatic of the analytical poverty possible in constitutional litigation."[194]

Among other constitutional scholars who have been sharply critical of the jurisprudence in *Roe* are the late Alexander Bickel of the Yale Law School, Arthur Miller of the Harvard Law School, Harry Wellington, former Dean of the Yale Law School, and Archibald Cox, former Solicitor General of the United States.[195]

Perhaps even more compelling criticism of the *Roe* decision, however, has come from the Justices themselves who were in dissent in that case. In a dissent far stronger than normally seen on the Supreme Court, Justice White stated,

> I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action invests that right with sufficient substance to override most existing State abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court.[196]

Justice Rehnquist similarly observed,

> The decision here to break the term of pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment.[197]

While fully respecting the authority of the Supreme Court to interpret the provisions of the Constitution, this Committee recognizes also the authority reposed in Congress under Article V of the Constitution to amend that document in response to what it views as wrongful or inappropriate decisions (see infra Section XI). To this end, the Senate

---

[193] Ely at 935–7.

[194] Epstein at 184.

[195] A. Bickel, The Morality of Consent (1975) (The Court in *Roe* was "not excused in transgressing all limits in refusing its own prior discipline"); A. Miller, Miller's Court (1982) ("The Supreme Court found a right to abortion without pointing to any specific words in the text of the Constitution."); Wellington, "Common Law Rules and Constitutional Double Standards," 83 YALE L.J. 221 (1973) ("Pickwickian" decisions); A. Cox, The Role of the Supreme Court in American Government (1976) ("The failure to confront the issue in principled terms leaves the opinion to read like a set of hospital rules and regulations . . . Neither historian, layman, nor lawyer will be persuaded that all the details prescribed in *Roe* v. *Wade* are part of . . . the Constitution"). For scholarship drawing an analogy between the *Roe* decision and the Supreme Court's decision in Dred Scott more than a Century earlier, see e.g., Swan, "The Thirteenth Amendment Dimension of *Roe* v. *Wade*," 4 J. JUV. L. 1 (1980); Csank, "The Lords and Givers of Life," Human Life Rev., Spring 1977 at 77; Noonan. "The Meaning of Dred Scott," 1979 ARIZ. ST. L.J. 1.

[196] 410 U.S. at 221–22 (Justice White dissenting).

[197] 410 U.S. at 174 (Justice Rehnquist dissenting).

Committee on the Judiciary in this Report recommends that the Constitution be so amended to overcome the effects of *Roe* v. *Wade* and its progeny and to restore authority in the legislative branches of government over the practice of abortion.

VIII. TECHNIQUES OF ABORTION

An appreciation of the specific techniques involved in abortion may be instructive in fully understanding the issue. A variety of abortion methods are employed depending on the gestational age of the unborn child and other factors. There are five methods: (1) Suction-Aspiration; (2) Dilation & Curettage; (3) Prostaglandin; (4) Intrauterine Saline Instillation; and (5) Hysterotomy.[198]

Of these methods of abortion, the most commonly performed is suction-aspiration. This includes the abortion procedure also referred to as "menstrual induction." In the suction-aspiration abortion procedure, the approach is through the vagina. After dilation of the cervix, a hollow plastic tube with a sharp cutting edge on the end is inserted into the uterus. A powerful suction then extracts the uterine contents (blood, amniotic fluid, fetal parts, placental tissue). This procedure is used through the first 12 weeks of pregnancy. In very early abortions (4 to 6 weeks), a small flexible plastic tube is used to reduce the degree of dilation of the cervix. However, these small tubes frequently become plugged with fetal parts and tissue and may result in incomplete abortions with bleeding, infection, and occasionally even continued pregnancies.

In later suction-aspiration abortions (up to 12 weeks), larger, more rigid tubes are used. This is necessary due to the increasing size of the fetus. These larger, sharp-edged tubes tear apart the body of the fetus, with the fetal parts then being sucked out through the tube. In both early and late suction abortions, the attached placenta must be cut away from the inner walls of the uterus.

An alternate method in the first 12 weeks, also done through the vagina, is the dilation and curettage (or D. & C.) abortion. It is similar to the suction-aspiration method except that, instead of a suction curette tube, the abortionist uses a loop-shaped steel knife. The body of the fetus is cut apart, removed, and the placenta sliced away from the uterine wall.

After 12 weeks and in some facilities as late as 18–20 weeks, a similar procedure, a dilation and evacuation abortion (or D. & E.), is done. The D. & E. uses a different instrument (usually an ovum forceps) with sharp metal jaws. This is used to grasp a part of the fetus' body, tear it away from the remainder of the body, and remove it. This process of dismemberment continues until the fetus' entire body has been removed from the womb. A curette is then used to cut away the placenta. The baby's skull is often hardened into bone at this stage of development and must be compressed or crushed.

Examination of the tissues and body parts after all of the above abortion procedures is necessary. This verifies that a pregnancy was present, the location of the pregnancy (intra- or extrauterine), the gestational age of the fetus, and whether or not the abortion was complete, i.e. all fetal parts removed. If the abortion is performed after the 12th gestational week, all body parts (head, thoracic cage, spinal column, and all four extremities) must be laid out, reassembled and identified. If any tissues are absent, the uterine cavity is re-explored to ensure completion. In any case, following the abortion, the uterus is explored with a curette and the procedure completed with one final suction to encourage uterine contraction and to discourage bleeding.

---

[198] See, e.g., J. Willke, Handbook on Abortion (1979 ed.) at 28–36.

A third method of inducing abortion is through the use of one of three currently available "prostaglandin" drugs which induce uterine contractions. These drugs produce violent and sustained contractions (labor) and result in the vaginal delivery of a (usually) dead baby. A major complication is the occasional delivery of a live baby when the process of premature labor has not resulted in the death of the fetus before birth.[199]

The fourth major abortion method is intrauterine saline instillation. This is most commonly performed during the late second trimester. A long needle is inserted through the abdomen into the amniotic sac in which the fetus is located. Amniotic fluid is withdrawn and replaced by a 20-percent solution of sodium chloride. After this saline injection, the mother goes into labor and delivers, generally within 24 hours, a (usually) dead baby. If the baby fails to be delivered within 48 hours, a second instillation may be necessary. The cause of death for the fetus is that of acute salt poisoning, with the development of widespread hemorrhage and shock. Frequently, upon delivery it is evident that much of the baby's skin has been stripped away by the action of the salt, giving the red glazed appearance of what is sometimes known as a "candy apple baby".[200]

The fifth major abortion method is hysterotomy. Hysterotomy abortions are similar in technique to Cesarean section deliveries. An incision is made into the abdomen and uterus and the fetus, placenta and amniotic sac are removed. The umbilical cord is usually severed and clamped while the fetus is still inside the womb. Generally, expiring from lack of oxygen, the baby is delivered and if still alive placed in a basin and allowed to die. Hysterotomy abortions are performed when either the salt poisoning or prostaglandin methods have failed, when sterilization is to be performed simultaneously, or for maternal health reasons.

IX. Social Impact of Roe

The fact that legalized abortion has an important public or social dimension is sometimes obscured by abortion advocates' emphasis on the "privacy" of the abortion decision. The fact that legal abortion is now the most commonly performed surgical procedure in the United States cannot help but have a public impact on American society. This impact involves both readily quantifiable factors, such as effects on infant and maternal mortality, and more qualitative factors, such as the influence of legalized abortion on our society's values, attitudes and general character. Both sides in the debate admit the existence of this public dimension, but there is considerable disagreement over the interpretation of the facts, and in many cases over the facts themselves. Some of the most widely discussed features of this controversy are outlined below.

---

[199] See, e.g., the insert of Upjohn Company as reported in "Avoiding Tough Abortion Complications: A Live Baby", Medical World News, Nov. 14, 1977. The insert states in part, "Unlike the use of 20 percent hypertonic saline which usually has a lethal effect on the fetus, the administration of Prostin E2 suppository does not appear to affect the feto-placental unit [the baby] and there exists the possibility that a live-born fetus may occur.' The possibility of a child being born alive during a late-term abortion, an event which some estimate to occur about once a day in the United States, has been cited as one of the most serious "complications" connected with abortion at this stage. See Liz Jeffries and Rick Edmonds, "Abortion: The Dreaded Complication", Philadelphia Inquirer, August 2, 1981.

[200] Supra note 198 at 31.

INCIDENCE OF ABORTION

There can be little doubt that the legalization and consequent nationwide institutionalization of abortion has resulted in a significant increase in the total number of induced abortions. There is, however, a great deal of disagreement over the size of the increase. One study published in 1958 estimated that the number of illegal abortions "could be as low as 200,000 and as high as 1,200,000 a year", adding that "there is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency." [201] In 1969, Dr. Christopher Tietze of The Population Council reported that "no new data on which to base a more reliable estimate have become available since"; [202] and a 1975 "factbook" on abortion published by the same organization admitted that "no reliable method has yet been developed to estimate the numbers of illegal abortions".[203] In 1981, a team of investigators (Syska, Hilgers and O'Hare) proposed a new model for estimating criminal abortions for the period 1950–1977 based on data concerning the maternal mortality rate from abortion relative to the mortality rate from natural birth: here, estimates ranged from a low of 39,000 (in 1950) to a high of 210,000 (in 1961) with a mean of 98,000 a year. This study concludes that previous estimates have been "grossly exaggerated", and that legalization has increased the total number of abortions by six- to eleven-fold. Recognizing that many illegal abortions (i.e., abortions performed by non-physicians) continue to be performed, the authors estimate that "for each single criminal abortion which has been eliminated, there have been over 18 legal abortions." [204]

A related issue is the degree to which the annual number of legal abortions continues to rise nine years after the Supreme Court's decisions. The Center for Disease Control's "Abortion Surveillance" division claims that 615,831 legal abortions were performed in 1973, the year following those decisions; this number has now reached 1.24 million for 1979, the latest year for which figures are available.[205] The Alan Guttmacher Institute, research affiliate of Planned Parenthood Federation of America, has published its own reports showing 1.5 million legal abortions in 1979. In addition, the Institute publishes estimates of unmet abortion "need" in the United States. In 1978, its researchers claimed that 1.3 million legal abortions had been performed in 1977 but that 550,000 women in need of abortions had been unable to obtain them; but in 1981, they claimed that 641,000 women "in need" were unable to obtain abortions in 1978 despite the addition of 200,000 abortions over the previous year.[206] If abortion continues to become more widely available and more aggressively promoted as a socially approved method for dealing with an unplanned pregnancy, there seems good reason to suspect that both the number of abortions and the perceived "need" will continue to rise for some time to come. Also increasing is the percentage of abortions performed on women who have already had a previous induced abortion; the Center for Disease Control reports that "repeat" abortions accounted for 29% of the abortions performed in 1978, compared with 18% in 1975. 1.8% of the abortions performed in 1978 (almost 21,000) were on women who had 3 or more previous abortions. The highest "repeat" abortion rate (34%) occurred in the District of Columbia and the city of New York, which report more abortions than live births annually.[207] The Alan Guttmacher Institute has estimated that 30% of all pregnancies nationwide were terminated by abortion in 1978 and 1979.[208]

---

[201] Mary Calderone (ed.), Abortion in the United States, 180 (1958). See, generally, on this issue the testimony of Dr. Thomas Hilgers, Associate Professor, Department of Obstetrics and Gynecology, Creighton University School of Medicine. Senate hearings. October 14, 1981. [The Subcommittee on the Constitution also has on file a remarkable film presented by Dr. Hilgers to the Subcommittee on October 14, 1981 showing the stages of fetal development as identified through new diagnostic ultrasound processes. The film in effect explores the earliest development of human life in the womb.]

[202] Tietze, "Induced Abortion as a Method of Fertility Control," in Behrman et al. (ed.), Fertility and Planning: A World View 311 (1969).

[203] Tietze and Murstein, Induced Abortion: 1975 Factbook, 2nd edition, 13 (1975).

[204] Syska, Hilgers, and O'Hare, "An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy," in New Perspectives, 164–181.

[205] Morbidity and Mortality Weekly Report, Annual Summary 1980 (U.S. Department of Health and Human Services), September 1981 at 103.

A final difficult question relating to the incidence of abortion is the likely effect of laws restricting abortion. Dr. Irvin Cushner, in his testimony before the Subcommittee, claimed that less than 20 percent of the abortions currently performed would be eliminated by restrictive abortion laws, and that almost 80 percent of the current number of abortions would become illegal abortions. This estimate seems to ignore any effect of abortion restrictions in encouraging the prevention of pregnancy, as well as the broader teaching effect of legislation in general. It also seems contrary to the American experience with regard to abortion funding restrictions. When Federal funds for Medicaid abortion were restricted in 1977, the Center for Disease Control conducted an extensive study of abortion complications in various States to determine whether the funding restriction had resulted in a resort to illegal abortions. The study concluded "that the restriction of public funding for legal abortions had not increased the number of illegal abortions, but that it had reduced the number of legal abortions obtained by poor women." This withdrawal of public funding, which certainly constituted a lesser obstacle than a legal prohibition, caused up to 35 percent of the women who would have had abortions to carry to term.[209] In other advanced countries in which women have been limited in their access to a legal abortion, the percentage of women choosing to carry their children to term has been as high as 86 percent.[210]

---

[206] "Abortion in the United States, 1976–1977", Family Planning Perspectives, September–October 1978, at 271: "Abortion in the United States, 1978–1979", Family Planning Perspectives, January–February 1981, at 6.

[207] Center for Disease Control, Abortion Surveillance: Annual Report 1978 (U.S. Department of Health and Human Services), November 1980 at 4, 30.

[208] "Abortion in the United States, 1978–1979", at 6.

[209] Abortion Surveillance: Annual Report 1978 at 1 and 14: "Effects of Restricting Federal Funds for Abortion—Texas", Morbidity and Mortality Weekly Report, June 6, 1980, at 253–4. The CDC's preliminary report on abortion for 1979 notes that "(t)he absence of any deaths from illegal abortions in 1979 indicates that restricting federal funds for abortion probably had little impact in causing low-income women to seek illegal abortions" (*MMWR*, February 5, 1982, at 50).

[210] See the Swedish and Norwegian studies described in Daniel Callahan, Abortion: Law, Choice and Morality, 75–77 (1978).

EFFECT ON MATERNAL MORTALITY AND MORBIDITY

The claim has been made by many advocates of legalized abortion, including several witnesses testifying before the Subcommittee, that "safe and legal" abortion has largely displaced unsafe "back alley" abortions and resulted in fewer complications and maternal deaths among women who have abortions.[211] The claim that legal abortions have simply replaced illegal abortions seems mistaken in light of the data recounted above. As for complications and maternal mortality, previous estimates of the benefits of legal abortion in this regard must be corrected or at least supplemented by an appreciation of the following factors:

(a) As was noted in testimony before the House Judiciary Committee in 1976, maternal mortality from abortion has been decreasing steadily since 1942 at a rate comparable to that of maternal mortality from other causes. This drop in the maternal mortality rate seems due largely to improvements in medicine in general (e.g., the development of antibiotics) as well as to improvements in maternal care in particular. Some have suggested that the development of modern abortion technology contributed to this decline, and that this technology would continue to be used by criminal abortionists if abortion were again made illegal.[212] Since 1973, maternal mortality due to abortion has reached a plateau, and indeed increased in 1977 and again in 1979. In a new study on this matter, Hilgers and O'Hare have concluded that "the legalization of abortion has had no effect on the already existing downward trend in the maternal mortality rate." [213] At the same time that illegal abortions continue to be performed and to result in several women's deaths annually, legal abortions make their own contribution to the maternal mortality statistics.[214] The same seems to be true of non-fatal abortion complications, largely due to the sheer number of abortions performed. One major study of American hospitals reports that 35,000 women received treatment for abortion complications at these hospitals in 1979, compared with 11,000 in 1969.[215] In his testimony, Dr. Cushner noted that all abortion carries risks because of the special sensitivity and vulnerability of the uterus during pregnancy. Risks are especially high in abortions after the first trimester, for which some studies show a complications rate higher than 50%.[216]

(b) Recent events indicate that deaths from legal abortions may be seriously under-reported in official statistics. Political scientist Hadley Arkes, commenting on twelve previously unreported deaths discovered in 1978 in connection with four legal abortion clinics in Chicago, has noted:

---

[211] See, e.g., Senate hearings, November 16,1981, Frank Susman, attorney; December 16, 1981, Bella Abzug, Women U.S.A.; November 16, 1981, Joel Pritchard, U.S. Representative.

[212] Senate hearings, October 14, 1981, Dr. Irvin Cushner, M.D.; also see Bernard Nathanson, with R. Ostling, Aborting America, 194 (1979).

[213] Hilgers and O'Hare, Abortion Related Maternal Mortality: An In-Depth Analysis", in New Perspectives, 90. See also, generally, on this issue the testimony of Dr. Hilgers, Associate Professor, Department of Obstetrics and Gynecology, Creighton University School of Medicine. Senate hearings, October 14, 1981.

[214] Abortion Surveillance: Annual Report 1978, at 1, 61–62.

[215] Hospital Record Study (Joint publication of the Commission on Professional Hospital Activities, Ann Arbor, Michigan, and IMS America Ltd., Ambler, Pennsylvania).

[216] Cates, Schulz, Grimes and Tyler, "The Effect of Delay and Method Choice on the Risk of Abortion Morbidity", Family Planning Perspectives, November–December 1977, at 276.

> Those deaths, which were uncovered in only four clinics, amounted to nearly half of the deaths that were reported officially for abortion in the nation as a whole. And if, as we suspect, the experience in Chicago can find a modest replication in New York, Detroit, Los Angeles and other cities, the total deaths due to legal abortion may now exceed the number of deaths that were thought to occur each year as a result of illegal abortions.[217]

The Chicago experience is also instructive in shedding light on the implications of the Supreme Court's rulings on first-trimester abortion: Public health officials in the city were aware of numerous abuses at these clinics, but their attempts at licensing and regulating them had been ruled unconstitutional by the United States Court of Appeals for the Seventh Circuit, which pointed to *Roe* and *Doe's* ruling that regulations designed to protect the pregnant woman during an abortion are invalid until after the first trimester of pregnancy. The Supreme Court refused to review this decision.[218]

(c) The claim that abortion is generally safer than childbirth has recently been contested by the previously mentioned Hilgers and O'Hare study, which reports that this claim has been based on invalid comparisons of statistics which do not deal with the same populations. Hilgers and O'Hare conclude that abortion may well be more dangerous than the continuation of pregnancy both before and after the 20th week.[219] Since the complications of pregnancy and childbirth are being reduced yearly by medical advances, while abortion fatalities seem to have stabilized since 1973, the Supreme Court's judgment that first-trimester abortions are safer than childbirth may at some point become medically obsolete.

Opponents of legalized abortion have sometimes argued that any benefit to maternal health brought about indirectly by the legalization of abortion on demand is outweighed by the millions of fetal deaths which it has directly promoted.[220] Strictly from the standpoint of maternal health itself, however, the benefits of legalization are very much in doubt. Although the Supreme Court's 1973 decision cited these benefits as a factor in the Court's deliberations, the radical character of those decisions seems at present to be contributing to abortion-related maternal mortality.

---

[217] H. Arkes. The Philosopher in the City: The Moral Dimensions of Urban Politics 437 (1981). [Hereinafter cited as "Arkes."] Matthew J. Bulfin, M.D., has observed that serious non-fatal complications from legal labortion are also under-reported because reports are not sought from emergency room physicians or obstetricians and gynecologists in private practice, but only from the facilities which perform abortions. See "Complications of Legal Abortion: A Perspective from Private Practice," in New Perspectives 145–150. As Dr. Jasper Williams, an obstetrician and gynecologist who has practiced entirely in the inner-city neighborhoods of Chicago, observed. "Before abortions were made legal, I saw few people die from illegal abortions. Since they have become legal, I have seen more die than died before . . . Many of the abortions are now performed in so-called clinics manned by people who were doing abortions when they were illegal." Senate hearings, October 19, 1981, Dr. Jasper Williams, Chairman, Department of Obstetrics and Gynecology, Bernard Hospital, Chicago, Illinois.

[218] See: National Catholic News Service for Apr. 1, 1975; Chicago Sun-Times, Nov. 12, 1978; Chicago Tribune, Nov. 13, 1978.

[219] New Perspectives, 90. Hilgers and O'Hare note some statistical fallacies involved in prior comparisons of maternal mortality from abortion and childbirth at 69–70. Andre Hellegers, M.D., of Georgetown University Hospital had made similar observations in testimony before the Senate Subcommittee on Constitutional Amendments on Apr. 25, 1974.

[220] Arkes, 435–6; Senate hearings, November 5, 1981. Archbishop John Roach and Cardinal Terence Cooke, National Conference of Catholic Bishops.

INFANT MORTALITY

Advocates of legalized abortion have cited a decrease in infant mortality as among the benefits of legalization.[221] While it is true that perinatal mortality has been steadily decreasing in recent years, this has most often been attributed by researchers to advances in prenatal care, the regionalization of health care, and similar factors rather than to legalized abortion.[222] Since infant mortality tends to be particularly high among racial minorities and the poor, and since abortion services have been disproportionately directed at these segments of the population, abortion on demand may well result in a drop in the infant mortality statistics because infants who would earlier have been contributing to these statistics are now being eliminated prior to birth; but it is not clear how this can be cited as a social benefit, if the substitution of improved medical care for abortion would have brought these children to term alive and healthy.[223]

There is at least one way in which the incidence of abortion may be making its own contribution to perinatal mortality in the United States. Recent studies indicate that abortion may be a factor in causing stillbirths, miscarriages, and low birth-weight in later pregnancies of women who have obtained abortions.[224] The correlation seems particularly strong in women who have more than one abortion, which provides reason for concern at a time when the number of "repeat" abortions is increasing rapidly.

PSYCHOLOGICAL EFFECTS

Several witnesses have alluded to psychological aspects of abortion in their testimony before the Subcommittee. Frank Susman, an attorney, testified that abortion is "a significant, traumatic experience for almost all women." [225] Terry Beresford of Planned Parenthood of Maryland observed that most women make their decision to have an abortion with "anxiety", "distress", and "sometimes pain." [226] These two witnesses made such observations in order to emphasize their claim that women do not make the decision lightly and therefore that the law should not interfere with it.

Other witnesses, however, along with a growing body of literature on the subject, have suggested that the ordinary feelings of distress and anxiety associated with abortion are only the tip of the iceberg. Most women's strongest feeling immediately after an abortion is one of relief, but this is soon supplanted by more negative reactions. According to one study cited by psychologist Vincent M. Rue "it is superfluous to ask whether patients experience guilt—it is axiomatic that they will." [227] Dr. Rue has collected 34 different studies on psychological effects of abortion showing that "the negative potential reactions span anxiety and depression to psychosis and suicide." He notes that many of these reactions are not immediately apparent in superficial questionnaires because of pressure from peers and the surrounding society urging women to deny or dismiss negative reactions. At times they are suppressed, only to surface unexpectedly during subsequent psychotherapy as contributing factors to a neurosis or psychosis.[228] Thus, while Ms. Beresford, who sees patients at an abortion clinic immediately before and after their abortions, claims that "pregnant women appear to believe universally that interrupting fetal life is in no way similar or connected to killing infants or taking adult life", further investigation indicates that many women having abortions are subconsciously convinced that they are engaging in infanticide.[229] At times such feelings surface only much later in an overwhelming fashion—as in the case of Vicki McMillan of Women Exploited (an organization of women who have undergone abortions and who now oppose abortion), whose testimony recounted the severe fit of depression which she experienced years after her abortion upon seeing a television special on fetal development.

---

[221] Noted by Andre Hellegers, M.D. in Testimony before the Senate Subcommittee on Constitutional Amendments, Apr. 25, 1974.

[222] "Several States Showing Significant Decreases in Infant Mortality," Ob. Gyn. News, Jan. 15, 1981 (reports on South Dakota, Florida, and Alabama); Williams and Chen, "Identifying the Sources of the Recent Decline in Perinatal Mortality Rates in California," New England Journal of Medicine, Jan. 28, 1982, at 207-214; "Improved Perinatal Care Said to Explain Decline in Neonatal Mortality in the U.S.," Ob. Gyn. News, Mar. 15, 1980. The last two of these studies note that the incidence of low-birth-weight continues to be high in the U.S., but that modern neonatal medicine is capable of saving more infants of low birth weight than it was several years ago.

[223] See "Infant Mortality Studied Among Disadvantaged," Ob. Gyn. News, Jan. 1, 1981, at 25, where high infant mortality rates among the disadvantaged inner-city population is traced to "persistently poor health quality and nondirected medical care." This study notes that infant mortality is associated with low birth-weight, and that women with low-birth-weight infants had sometimes had a history of multiple abortions.

[224] Levin et al., "Association of Induced Abortion with Subsequent Pregnancy Loss," Journal of the American Medical Association, June 27, 1980 at 2495-99; Iffy et al., "Perinatal Statistics: The Effect Internationally of Liberalized Abortion," in New Perspectives, 92-127. In the United States, the District of Columbia has the highest "repeat" abortion rate of any area and one of the highest infant mortality rates ("City Infant Mortality Rate Rises," The Washington Post, June 19, 1981).

[225] Senate hearings, Nov. 16, 1981, Frank Susman, attorney.

[226] Senate hearings, Oct. 19, 1981, Terry Beresford, Planned Parenthood of Maryland.

This kind of occurrence is made more likely by the present legal situation, under which a wide variety of "informed consent" provisions for women considering abortion have been ruled unconstitutional: basic information on the nature of abortion is withheld from a woman until after it is too late to alter the decision, and she is confronted with the idea that "I have killed my child." [230] Some studies have recounted the occurrence of "anniversary reactions" in women who have had abortions—that is, severe psychological or emotional reactions occurring on the anniversary of the abortion or of the day when the aborted child would have been born—and one study has documented two recent instances in a single pediatrician's caseload in which such a reaction led to an adolescent suicide attempt.[231]

Although both abortion and childbirth can precipitate depression or even psychotic reactions in emotionally unstable women, studies conducted by Dr. Myre Sim and others indicate that the two different events involve very different prognoses. Genuine psychotic reactions are relatively rare in both cases; but childbirth can actually initiate an improvement in mental stability for women with mental illnesses, while there is no clear evidence that abortion ever results in such improvement. Prognosis for a psychotic reaction after abortion seems to be poor in half the cases, as compared with less than 2% chance of poor prognosis for a similar reaction after childbirth. While suicide, as noted above, is not unknown as a reaction to abortion, it is almost unknown among pregnant women and even among new unmarried mothers.[232]

---

[227] Illsley and Hall, "Psychological Research in Abortion: Selected Issues", in David (ed.), Abortion in Psychosocial Perspective 12 (1978). On issues discussed in this section, see generally, D. Mall and W. Watts (ed.), The Psychological Aspects of Abortion (1979). [Hereinafter cited as "Mall and Watts.']

[228] Sexton and Maddock, "The Rising Cost of Abortion", Medical Hypnoanalysis, Spring 1980; Liebman and Zimmer, "The Psychological Sequelae of Abortion: Fact and Fallacy", in Mall and Watts, 127–138.

[229] Kent et al., "Emotional Sequelae of Therapeutic Abortion: A Comparative Study," British Columbia Medical Journal 20 (1978), 118–9. A recent survey of abortion clinic patients showed that about 10% agreed with the statement that abortion is "equivalent to murder" and that about 26% openly disagreed with the statement that "a fetus is not yet a person." See Catholics for a Free Choice, Catholic Women and Abortion (1981), cited in Family Planning Perspectives, March–April 1982, 98–99.

[230] See Senate hearings, December 7, 1981, Rosemary Meyer, President of National Committee for a Human Life Amendment, Inc.

[231] Tishler, Ph.D., "Adolescent Suicide Attempts Following Elective Abortion: A Special Case of Anniversary Reaction", Pediatrics, November 1981, at 670–71.

The social implications of such findings are far-reaching. As Dr. Rue noted, indicators of social turmoil such as drug abuse, child abuse and suicide have all risen precipitously among American women since the legalization of abortion on demand, and the possibility of a causal relationship cannot be dismissed out of hand.

EFFECTS ON THE FAMILY

The large-scale effects of abortion become more obvious when our attention shifts from the pregnant woman herself to her relationships with others, and especially to those family relationships which help to make up the most basic institution in American society. Interviews have shown that a high percentage of women's relationships with their male partners fail within a short period after an abortion.[233] Dr. Rue's testimony noted some devastating emotional effects that abortion can have on a man who has protective feelings toward both the woman and the child which he has conceived with her; at the same time, abortion offers a "neat disposal system" for men who are unwilling to assume responsibility for their own actions, and therefore helps to foster male irresponsibility. Abortion and a stable marriage relationship seem particularly incompatible: married status makes the abortion decision even more stressful than it would be otherwise, and in turn "abortion weakens the marital structure" by denying procreative responsibility and creating fundamental conflicts between spouses with different value systems. Abortion can also isolate adolescents from their parents by encouraging resort to a "quick and easy" solution which evades problems instead of resolving them through family consultation.

The tendency of abortion to endanger family relationships is multiplied by the way in which Federal court decisions following upon *Roe* and *Doe* have attempted to insulate the individual pregnant woman or girl from interaction with spouse or parents. According to Dr. Rue, court rulings on requirements for spousal and parental consent or notification have ignored the importance of the family as a source for the resolution of problems and tensions, perpetuating a "fantasy" that decision-making can occur in a "relational vacuum". While some supporters of legalized abortion have testified that the abortion decision should be left up to "a woman and her family",[234] they ignore the fact that the courts' decisions on abortion have tended to discourage any kind of family consultation. Some witnesses have alluded to a tendency for the courts actually to intrude themselves into family relationships and substitute for the family in making abortion decisions on behalf of teenage girls and mentally incompetent women.[235]

---

[232] Sims, "Abortion and Psychiatry", in New Perspectives 151–163, especially 156–157. Also see Barno, "Criminal Abortion Deaths, Illegitimate Pregnancy Deaths, and Suicides in Pregnancy", American Journal of Obstetrics and Gynecology, June 1, 1967, at 356–67.

[233] E. Milling, "The Men Who Wait", Woman's Life, April 1975, at 48–9, 69–71 (cited in Senate hearings, November 4, 1981, Professor Vincent Rue, University of California at Los Angeles.) For greater discussion on the impact of abortion upon the family structure, see the combined testimony of Archbishop John Roach and Cardinal Terence Cooke, representing the National Conference of Catholic Bishops, Senate Hearings, November 5, 1981. The endorsement of the proposed amendment, S.J. Res. 110, marks the first time that the Conference has specifically endorsed a particular amendment to the Constitution regarding abortion.

Just as a correlation seems to exist between abortion and an increasing physical inability to carry future pregnancies to term, there also seems to be a relationship between abortion and the emotional or psychological interaction of women with their children. Some of the studies cited by Dr. Rue indicate difficulty in establishing normal maternal-infant bonding among women who have had abortions, and some psychologists have suggested a direct relationship between a prior abortion and the likelihood of child abuse.[236] These claims are as yet hotly debated among professionals. At the very least, however, the claim that abortion reduces the incidence of child abuse by preventing the birth of the "unwanted" child seems doubtful in light of the steady increase in child abuse in recent years.[237] There are at least two reasons why abortion has failed in this regard. First, as noted in a 1976 study conducted by the Department of Health, Education and Welfare which found no demonstrable decrease in "unwanted" births three years after the 1973 Supreme Court decisions, "an unwanted or unintended pregnancy does not necessarily mean an unwanted child" because an unintentionally conceived child usually becomes "wanted" by the time of birth. Second, as had already been noticed by researchers on child abuse prior to the Supreme Court's decisions, most abused children started out as very much "wanted" by their parents—indeed, the children who are most planned and "wanted" may have such unrealistic expectations imposed upon them that they may be at greater risk of being abused when they fail to live up to those expectations.[238]

Abortion seems to have been particularly unsuccessful in decreasing the number of teenage mothers. For a variety of reasons, a large number of teenage girls who become pregnant in the United States do not consider pregnancy as "unwanted", and do not think that motherhood will make their living conditions any worse than they already are. Thus while abortion does seem to have eliminated some children who might have lived in difficult circumstances, its most significant effect in this area seems to have been the elimination of children whose mothers would have been willing to put them up for adoption by families that want children. While half of the teenagers who became pregnant in

---

[234] Senate hearings, December 16, 1981, Linda Tarr-Whelan, National Education Association; November 12, 1981, U.S. Representative Theodore Weiss of New York.

[235] Senate hearings, October 5, 1981, Professor John Noonan, University of California Law School; November 5, 1981, Archbishop Roach and Cardinal Cooke, National Conference of Catholic Bishops.

[236] Ney, "Infant Abortion and Child Abuse: Cause and Effect," in Mall and Watts 25–38; Kumar and Robson, "Previous Induced Abortion and Antenatal Depression in Primiparae," 8 Psychological Medicine 711–14 (1978); V. Calef, "The Hostility of Parents to Children: Some Notes on Infertility, Child Abuse and Abortions," 1 International Journal of Psychoanalytic Psychotherapy 79–96 (1972).

[237] Although child abuse statistics rose dramatically in the early 1970's partly because of new efforts to improve reporting, the continued rise in these statistics cannot easily be dismissed. At about the same time that the New York Times announced "Nation Found Near Point of No Unwanted Births" (1/3/76), the Washington Post was reporting "Child Abuse Epidemic, HEW Says" (12/2/75).

[238] See: Report published in Advance Data (Department of Health, Education, and Welfare), January 21, 1980 (on incidence of "unwanted" births); V. Fontana, Somewhere a Child is Crying (1973), at 239–43 (on the abusing of "wanted" children and the ineffectiveness of abortion as a solution to the problem.)

1978 had abortions or miscarriages, only 4% of the unmarried teenagers who carried their babies to term offered the baby for adoption.[239]

Aside from the specific debate over abortion as a cause of child abuse, the ideology of the "wanted child" which is so closely linked with efforts to promote abortion as a social good has been accused of undermining the very meaning of the family as an institution. According to testimony presented before the Subcommittee by the Catholic bishops of the United States, the view that such an ideology strengthens the family by removing "unwanted" burdens ignores the family's role in American society as an institution for promoting spontaneous acceptance of other people and respect for their dignity and rights. The bishops argued:

> For most of us, the family is that training ground where we are first educated to the very idea of inherent human dignity and rights, because it gives us our first experience of being accepted and loved simply because we are and not because we have earned acceptance through our own achievements.[240]

To treat a child's entrance into his or her own family as though it were a matter of living up to certain standards of "wantedness" may be to help promote a society in which instinctive acceptance of others is supplanted by a more self-centered and grudging attitude. Combined with the Federal courts' tendency to treat abortion in terms of the totally isolated pregnant woman and her decision, this aspect of legalized abortion could have long-term effects on the strength of those interpersonal bonds which hold our society—indeed any society—together.

EFFECT ON THE MEDICAL PROFESSION

Psychological effects are experienced by the medical personnel who perform abortions as well as by the women who undergo them. These effects are often experienced most strongly by the nurses and other non-physicians who spend more time with the abortion patient than the physician does.[241] Workshops on personnel "burnout" have become common at conventions of organizations providing abortion services, and the emotional trauma of nurses who assist at second-trimester abortion procedures in hospitals has been the subject of various psychoanalytical studies.[242] Recently the growing use of the "dilation and evacuation" (or D & E) procedure in second-trimester abortion, which is safer for the woman than the older "saline" procedure but involves direct participation of the medical staff in the dismemberment of the fetus, is reported to have produced massive morale problems in many hospitals: an increased incidence of anxiety and tension, of disturbing nightmares, and of overall "emotional havoc" among the medical staff has been cited as a major difficulty.[243]

---

[239] See: Alan Guttmacher Institute, Teenage Pregnancy: The Problem That Hasn't Gone Away (1981); "Births to the Unwed Found to Have Risen by 50 Percent in 10 Years". New York Times, October 26, 1981, at A1 and B11. On the complexity of the factors involved in discussions of "unwanted" teenage pregnancy and its causes, see: "Teens, Parents, Officials Don't Agree on Impact of Teen Motherhood", Family Planning Perspectives, March–April 1981, at 81–2; Maracek and Flaherty, "Correlates of Teenagers' Contraceptive Use" (Study presented at American Psychological Association convention of September 1980 and announced in Ob. Gyn. News for Jan. 1, 1981); "Abortion and Teenage Pregnancy", in Respect Life (NCCB Committee for Pro-Life Activities 1977–78).

[240] Senate hearings, Nov. 5, 1981. Archbishop John Roach and Cardinal Terence Cooke, National Conference of Catholic Bishops.

[241] Kaltreider et al., "The Impact of Midtrimester Abortion Techniques on Patients and Staff". American Journal of Obstetrics and Gynecology, Sept. 15, 1979, at 235–8; McDermott and Char, "Abortion Repeal in Hawaii: An Unexpected Crisis in Patient Care", American Journal of Orthopsychiatry, July 1971, at 620–26.

[242] Discussions of staff "burnout" were recently featured at annual meetings of the National Abortion Federation (May 28–30, 1980) and the Planned Parenthood Federation of America (Oct. 28–Nov. 1, 1981).

It is not difficult to appreciate the tension produced among members of the healing profession by a procedure which, whatever its motive or justifiability, is clearly destructive in its nature and intent. This tension seems likely to be heightened in the future as medical science becomes capable of observing, diagnosing and treating a growing number of conditions prenatally. Entities denied any genuine human status for the purposes of the abortion procedure are increasingly being treated as patients in other contexts. As it becomes clearer to practicing physicians and others that the event of birth is simply one event among many in the development of a patient capable of receiving medical care, it will seem more and more arbitrary to have widely different attitudes toward the born and the unborn.[244] The medical profession is therefore increasingly confronted with a clear choice between a consistent "sanctity of life" ethic, directed at the care and healing of all members of the human race, and a "quality of life" ethic in which the life of both born and unborn can be subordinated to various criteria of usefulness or functional capability. This choice was squarely set before American physicians as early as 1970 in editorials in medical journals dealing with the idea of a "new ethic for medicine and society"; it is now being confronted in popular magazines reporting on medical controversies over the treatment of handicapped newborns and terminally ill patients.[245] The way in which this choice is made will clearly have major implications not only for the medical profession but for our society as a whole. It is likely to have a strong influence on the basic approach which our society takes with respect to its weakest and most defenseless members of whatever age.

SOCIAL AND POLITICAL DIVISIVENESS OF THE ABORTION ISSUE

Many of the witnesses testifying before the Subcommittee have alluded to the divisiveness and apparent intractability of the abortion controversy as it is presently conducted in the United States.[246] In recent years it has sparked heated debates over "single-issue" voting and the threat it may pose to the American political process, over the meaning and limitations of individual liberty, and over the proper role of religion and religious groups in poltics. Political debates on abortion itself have been marked by an inability by either side to understand or accept the other side's most fundamental arguments.

---

[243] Jancin, "Emotional Turmoil of Physicians, Staff Held Biggest D & E Problem", Ob. Gyn. News, Dec. 15, 15–31, 1981, at 1, 16.

[244] This aspect of the abortion issue has been emphasized in testimony of the National Conference of Catholic Bishops. Senate hearings, Nov. 5, 1981, and of Prof. Richard Stith, Senate hearings, Nov. 12, 1981. Also see J. C. Fletcher, "The Fetus as Patient: Ethical Issues", Journal of the American Medical Association, Aug. 14, 1981, at 772–3.

[245] A Newsweek article on medical ethics ("When Doctors Play God," August 31, 1981) recently noted that the Hippocratic Oath no longer constitutes an insuperable obstacle for physicians wishing to practice infanticide or euthanasia because many of them already "violate it every day" by condoning or performing abortions. In 1970, an editorial favoring abortion freely admitted that there is no clear discontinuity between life before and after birth, and discussed the abortion controversy in terms of a broader struggle between the older "sanctity of life' ethic and a "new ethic" which subordinates life at various stages to other social goals ("A New Ethic for Medicine and Society," California Medicine 113 (1970), at 67–8).

The "Infant Doe" case in Bloomington, Indiana—in which a Down's Syndrome infant starved to death because his parents did not wish a child with such a poor "quality of life" to survive—has dramatically illustrated for many the fact that the "new ethic" is increasingly being applied after birth as well as before it. The Indiana Supreme Court, in ruling that the hospital and the State could not overrule the parents' decision and give food and water to the newborn child, argued that it was merely allowing the parents a free "choice" in the matter. One commentator on this case has observed that "(t)he values and passions, as well as the logic of some portions of the 'abortion rights' movement, have always pointed beyond abortion, toward something like the Indiana outcome, which affirms a broader right to kill." George F. Will, "The Killing Will Not Stop", The Washington Post, April 22, 1982.

[246] For example, Senate hearings, November 16, 1981, Frank Susman, attorney.

Although the abortion debate certainly existed long before 1973, it seems clear that the complete intractability of the present controversy is due in large part to the extreme character of the Supreme Court's decisions of that year and their progeny. These court rulings have given abortion the status of a constitutional right and have invalidated almost all effective restrictions on abortion throughout the nine months of pregnancy. The Court's reading of this radical policy into the Constitution has prompted an equally radical reaction and frozen our legal system into a position which allows for none of the negotiation and accommodation characteristic of a democratic system of government.

The bitterness of the current debate is exacerbated by the manner in which the Supreme Court's decisions have blocked at the outset any attempt to base abortion policy on the gradual discovery of new facts and arguments about abortion. As Professor Richard Stith observed in testimony,

> If the fundamental facts on which the law is based are to be finally and arbitrarily defined by the Court to suit its wishes, then no one can even sensibly object to the laws which govern us. Pro-lifers, for example, argue that certain facts (such as the heartbeat, brain waves, or physical appearance of the unborn) indicate that abortion kills a human being, and they are frequently met with the response that there is no point in claiming abortion kills since the Court has decided the issue once and for all. Such a world is an Orwellian nightmare; just as in "1984" one could not sensibly be a pacifist because war was officially defined as peace. If the factual concepts on which legal decisions are based are mandatorily defined in ways which can support only the results reached, the possibility of reasoned public criticism is eliminated.[247]

In the legislative arena, issues like abortion would normally involve extended debate over the facts—not only facts concerning the nature of life before birth, but also medical, legal and social facts of the sort summarized in this Report. This process has been rendered moot with regard to the abortion issue, because the facts as known or believed by the Supreme Court in 1973 have been given the status of unchangeable constitutional law. A large segment of the American citizenry therefore feels that it has simply been excluded from the decisionmaking process on this issue, because any arguments it makes and any facts it brings forward are irrelevant to the continued validity in law of the facts and arguments on which the Supreme Court claims to have based its decision. The Supreme Court's rulings are therefore perceived by many not as an application of reasoning to the law but as an act of raw power which has cut short the Nation's ability to think and act reasonably on this topic. If these decisions have complex social ramifications of the sort outlined in this Report, it would seem that the Court has indeed made important policy decisions affecting many aspects of American society and that American voters and legislators have been barred from making their own contribution to these decisions.

---

[247] Senate hearings, November 12, 1981, Professor Richard Stith, Valparaiso University School of Law.

X. ABORTION AND PUBLIC OPINION

Public opinion polls have often been cited to support stances both for and against legalized abortion. These polls have not always given reliable or consistent information because of differences in sampling, in the phraseology of questions, and in the respondents' level of knowledge on the issues. Such problems, of course, are common in public opinion polls taken on any complex issue.

The abortion issue, however, also carries with it special complications: both sides in the dispute claim that the issue is a matter of fundamental right and therefore that the vagaries of public opinion are inadequate to express the full significance of the issue. Opponents of abortion further point out that one of the two entities most intimately involved in every abortion procedure—the unborn child—is unable to express his or her viewpoint on public policy regarding abortion. Advocates of the abortion right point out in response that the Supreme Court has treated the issue in terms of a woman's constitutional "right of privacy" and claim that the views of women should be accorded special weight regarding an issue which men do not confront in the same manner.

But even here, some knowledge of public opinion may be of help, not in assessing the objective validity of either claim, but in assessing whether most Americans would consider either as valid. Some polls, for example, suggest that, to the extent differences exist on matters of abortion policy between the sexes, women may be even *more* protective of the rights of the unborn than men. Women consistently place the point at which "human life begins" at an earlier stage than do men and may be even more opposed to legalized abortion than are men.[248] In fact, the very groups that are often viewed as "under-represented" within our political system, i.e., women, racial minorities, the poor, are more opposed to abortion than the rest of the population, according to many public opinion polls.[249] Concomitantly, those groups best represented within this system may be disproportionately supportive of the *Roe*-spawned abortion right. According to a recent poll conducted by the Connecticut Mutual Life Insurance Company, only 29 percent of the "political leaders" within the United States considered abortion as "morally wrong" as opposed to 65 percent of the general population.[250]

---

[248] On the question of "when life begins," see the Judith Blake poll of 1977 cited in Senate hearings, December 7, 1981. Professor Raymond Adamek, Kent State University. [Hereinafter cited as "Adamek."] On the question of legalized abortion: ABC News/Washington Post, 1981; Gallup, February 27–March 1, 1976; DeVries & Associates. November–December 1974. Polls which distinguish between the responses of men and women generally find opposition to legalized abortion to be 5 to 10 percent higher among the latter.

[249] This is the consistent finding of all polls which distinguish among these groups. For example, the ABC News/Washington Post poll taken in 1981 showed that almost one-third of those strongly opposing legalized abortion earn under $12,000 a year, with only 10 percent earning 30,000 or more, and that nearly one-quarter are black. More than one-quarter of those supporting legalized abortion earn $30,000 or more. Annual abortion polls taken by the National Opinion Research Center have consistently shown that black Americans are strongly opposed to abortion on demand and some have even suggested that they are more opposed to legalized abortion than Catholics are. See Andrew M. Greeley, "Black Stand on Abortion," in the New York Daily News, March 12, 1978. It seems clear that the issue of religion has often been overemphasized in the debate on abortion policy. Although some differences in survey responses seem traceable to denominational differences, intensity of church involvement and commitment to a traditional personal morality seem to be much more strongly associated with opposition to abortion than is any particular denominational affiliation. See: ABC News/Washington Post poll of 1981; Gallup polls of 1975 and 1977. This result is quite understandable in light of the fact that major Western religious denominations condemned abortion almost unanimously until recent years. See on this issue generally Grisez, Abortion: The Myths, the Realities, and the Arguments (1970), Chapter IV; J. Noonan, A Private Choice, 53–63; New Perspectives, Chapters 25–27. The U.S. Supreme Court, despite its strong commitment to the "right" of abortion, has never accepted the view that abortion restrictions violate the Religion Clauses of the First Amendment. See *Harris* v. *McRae*, 100 S. Ct. 2671 at 2689 (1980).

Within the limits of these polls, several general observations can be made about public opinion and abortion. Professor Adamek testified on a number of these before the Subcommittee.[251] Despite differences in the wording of questions and the span of time over which the various polls were taken, Professor Adamek has identified certain patterns of response which are relatively consistent.

1. Neither the opponents of all abortion nor the advocates of unrestricted abortion can claim agreement with the majority of the American people. The population can be divided roughly into three groups: those who oppose legalized abortion in virtually all circumstances (perhaps 22%); the "middle majority" which opposes legalized abortion except for certain "hard cases" such as serious endangerment to the mother's health, rape or incest, and likelihood of serious defect in the baby (about 55%); and those who want abortion to remain legal in all circumstances (about 23%).[252]

2. Support for legalized abortion deteriorates significantly as soon as one speaks of abortion after the first trimester. There is no majority support for abortion under any circumstances after this point, except in the case of danger to the mother's life.[253]

3. Support also deteriorates as soon as one speaks in terms of specifics instead of vague generalities. For instance, one Gallup poll showed 64% support for the proposition that "the decision to have an abortion should be made solely by a woman and her physician", but another Gallup poll taken in the same year showed only 24% support for the proposition that a woman should be "able to get an abortion without her husband's consent." [254] (This kind of discrepancy oc-

---

[250] This finding was reported in the Wall Street Journal, May 15, 1981. The same poll found the socio-demographic correlations that other polls have reported: Moral opposition to abortion is strongest among women, the poor, and racial minorities.

[251] The data analyzed include results from the National Opinion Research Center for 1972 to 1980, the Gallup Opinion Index for 1972 to 1981, and individual polls conducted by Judith Blake, ABC News/Washington Post, and CBS News/New York Times, as well as prior analyses of poll data by Blake, Donald Granberg and other sociologists. A useful summary of the issue of public opinion on abortion is contained in Duggan, "Abortion and the Opinion Polls", Supplement to Catholic League Newsletter, Vol. 8, #6.

[252] The major source for this finding is a series of five Gallup polls taken from 1975 to 1981. Similar results have been obtained by the National Opinion Research Center in eight polls taken from 1972 to 1980. See Adamek, tables 2 through 4. An ABC News/Washington Post poll taken in 1981 showed 40 percent who "generally speaking" agreed that a woman should be able to get an abortion if she wants one, but these respondents were not asked whether they supported legalized abortion in all circumstances. The 60 percent who disagreed with the statement were generally found to favor legalization only in certain rare circumstances, and this only in the first trimester. Earlier in the same poll the public's feelings about "right to life" and "pro-choice" groups was elicited: 71 percent had heard about "the right to life group", and a majority of these claimed to agree with this group's position on abortion, while only 24 percent had heard of "the pro-choice group", and 46 percent of these claimed to agree with its position on abortion. These findings do not seem to contradict those of NORC and Gallup: they are consistent with the claim that support for abortion "generally speaking" deteriorates rapidly as soon as particular circumstances are mentioned.

[253] See Adamek, table 3, based on Gallup surveys of 1978 and 1979.

[254] See Adamek, table 1. In any event, the idea that abortion decisions are currently made by "a woman and her physician" has been called a "myth" by many physicians. As Bernard Nathanson, an obstetrician and gynecologist who helped found the National Abortion Rights Action League, testified, "In virtually every instance when a woman presents herself to the doctor her mind is already made up, and the doctor is nothing more than the instrument of her will. In that there are only very few medical reasons for abortion, the vast majority of abortions are decided upon for financial, emotional or situational reasons. There is no physician input into the decision-making process in permissive abortion." Senate Hearings, October 14, 1981, Dr. Bernard Nathanson, Obstetrician and Gynecologist, St. Luke's-Roosevelt Hospital; Assistant Clinical Professor, Cornell Univer- the author of an important work tracing his evolution on this issue, B. Nathanson with R. Ostling, Aborting America (1979).

curs even within the membership of the major "abortion rights" groups: for instance, a poll of members of the National Abortion Rights Action League, not cited by Adamek, shows 85% support for legalized abortion in all circumstances, but only 58% support for legalized abortion when the child is not of the preferred sex. Some legal abortions are already being performed for this reason, according to the news media.)[255]

4. Polls seeming to indicate majority approval of the Supreme Court's abortion decisions have been flawed in several respects. By keeping to vague generalities, by wording the question in a misleading or euphemistic way, and by misrepresenting the Court's decision as legalizing abortion only during the first trimester, these polls obscure the fact that the majority of Americans approve of legalization only in cases which constitute less than 5% of the abortions now performed legally in the United States.[256]

5. There is serious disagreement between the Supreme Court and the American people on the question of "when life begins" as well as on the question of when the unborn may be considered as a "human person." As mentioned above, disagreement with the effect of the Court's decision is significantly stronger among women than among men. Three polls taken in 1981, for example, indicate that a majority of the public believes that human life begins within the first trimester of pregnancy, while only 5 to 17% believe it begins at birth. A poll reported by Judith Blake in 1977 shows only 18% of men and 8% of women adopting the stance that human personhood begins at birth, while 33% of the men and 51% of the women believe that it is present at conception.[257]

A recent study by Judith Blake and Jorge Del Pinal of the University of California, based on the findings of 18 public opinion polls taken from 1965 to 1980, lends support to Adamek's most important conclusions.[258] This study also found that most Americans fall into the "middle" category, disapproving of unrestricted abortion but approving of legalization in certain rare circumstances. This study reached two additional conclusions which are of special significance for the debate over attempts to reverse the Supreme Court abortion decisions:

---

[255] For the opinion survey of National Abortion Rights Action League members, see Granberg, "The Abortion Activists," in Family Planning Perspectives, July/August 1981, at 163. Under current constitutional law, a third-trimester abortion performed for purposes of sex selection is legal, and requires only that the physician performing the abortion believe that the birth of a child of the "wrong" sex might adversely affect the mother's "well-being." This issue was recently debated on the PBS television program "Boy or Girl: Should the Choice be Ours? , which was first aired in January of 1981 as part of a six-part series on bioethics titled "Hard Choices." Also see McTaggart, "The Breakthrough that Backfired," New York Sunday News Magazine, Feb. 8, 1981.

[256] See Adamek, at 4. Dr. Irvin Cushner of the University of California has testified that "something on the order of 2 percent of all of the abortions in this country are done for some clinically identifiable entity," including abortions to prevent the birth of a handicapped child; Dr. Cushner estimated that about 1 percent are performed for "physical health" reasons. Senate hearings, October 14, 1981. According to Dr. Richard Schmidt of the University of Cincinnati School of Medicine, only "a minute fraction" of the total number of abortions are currently performed for "life-saving indications," and the number of indications continues to decrease every year. Senate Hearings, October 19, 1981. As U.S. Representative Vin Weber of Minnesota testified, "Abortion has become a technique used for family planning. Millions of people find it inconvenient to have a child, or they wish to better plan their families, a sort of social engineering." Senate Hearings, December 16, 1981. Another witness, Bella Abzug of Women U.S.A., testified to the fact that some groups supporting legalized abortion now see it primarily as a "method of birth control." Senate hearings, December 16, 1981. None of the major public opinion polls show majority support for this state of affairs.

[257] See Adamek, table 6.

[258] Blake and Del Pinal, "Negativism, Equivocation, and Wobbly Assent: Public 'Support' for the Prochoice Platform on Abortion", 18 Demography 309–320 (August 1981). This study is based on eight NORC surveys from 1972 to 1980, eight Gallup surveys from 1968 to 1977, and two National Fertility Surveys conducted in 1965 and 1970.

1. Even among the minority which supports abortion on demand, there is little support for the full extent of the Supreme Court's decisions or for the full agenda of the "pro-choice" movement. This group shows no strong support for the Federal funding of abortion, for abortion without the husband's consent, or for abortion after the first trimester.[259]

2. People in the large "middle" group are "markedly more similar to respondents who are negative toward abortion than to those who are positive" when one analyzes their background characteristics and attitudes toward related issues. Abortion thus appears to take its place "at the end of a long line of issues on which 'policy' has run far ahead of the nation's will to execute." [260]

Further support for these conclusions has recently come from a somewhat unexpected source. Jeannie Rosoff, president of the Alan Guttmacher Institute which conducts research for the Planned Parenthood Federation of America, recently announced at a Planned Parenthood public impact seminar that the American people support legalized abortion only in the rare "hard cases" and that it is becoming difficult to ignore "people's genuine discomfort at the number of abortions" currently performed in the United States.[261] Most of these abortions, Rosoff noted, are performed for social, economic, age, or lifestyle reasons, and "support dwindles very, very rapidly" as soon as these are presented as justifications for a legal abortion.

Feelings on public policy regarding abortion do seem to translate into support for specific proposals designed to reverse the Supreme Court's abortion decisions. In a poll conducted by DeVries & Associates in November and December of 1974, only 25.1 percent elected to let the decisions stand; 32.8 percent thought that Congress should reverse the decision and make abortions illegal either in all circumstances or except to save the life of the mother; and 39.5 percent favored a somewhat lower level of constitutional protection for the unborn, either by having Congress make abortions illegal except in specific cases determined by law or by restoring the authority to make abortion laws to the States. Opposition to the Supreme Court's decisions is slightly higher now than in 1974, so support for these proposals would now presumably be somewhat stronger than it was in 1974.[262] If the analyses of Blake and Adamek are correct, even many of the people who claimed to support the 1973 Supreme Court decision in this 1974 poll would favor more restrictions on abortion than are currently provided for under these decisions and their progeny.

More recently, three polling organizations asked Americans whether they would support legislation that would or might make all abortions "murder." Support for such a measure ranged from 29 percent to 42 percent—apparently indicating that some in the "middle majority" will side with the anti-abortion stance even when presented in its most extreme form, if they are asked to choose between this and the present state of affairs.[263]

---

[259] Id. at 315–16.

[260] Id. at 312–16.

[261] Reported in Andrusko, "Don't Be Misled by Polls, Proabortion Leader Warns", National Right to Life News, Nov. 9, 1981, at 3. Rosoff's comments were part of an October 31 seminar in Washington, D.C. on "External Strategies: The Fight for Reproductive Rights in the 1980's."

[262] Increased opposition to the Supreme Court's abortion decisions is indicated by Gallup polls of 1974 and 1981; 46% opposition to these decisions' legalization of first-trimester abortion was recorded in the more recent poll. These questions did not deal with other aspects of the decisions, such as late-term abortion, spousal and parental consent, or medical regulations.

In order to appreciate the full significance of these findings for the proposed amendment it is necessary to understand how flexible the provisions of this amendment are. It would be difficult to see how public opinion could be cited as evidence against the proposed amendment, when its precise objective is to allow public policy to keep pace with public opinion through the democratic process. One study conducted by Market Opinion Research and the National Abortion Rights Action League, however, claims that "over half the voters interviewed believe that abortion is not an issue in which government at any level should be involved", with the implied claim that government is not presently involved in the abortion issue and that passage of a constitutional amendment would initiate this unwanted involvement.[264] But the legal reality, and the reason why opposition to the Supreme Court's abortion decisions has been so strong and persistent, is that these decisions press government at its most fundamental constitutional level into the service of abortion. Abortion has been singled out for special treatment by the Federal courts, to the extent that health regulations and consent requirements deemed appropriate for medical procedures of similar hazards and complexity are ruled unconstitutional in the case of a first-trimester abortion.[265] If complete absence of government involvement in this issue were really desired, this could be achieved by ratifying S.J. Res. 110 and then failing to enact any penal legislation on the matter; for under such circumstances, abortion would be neither a crime nor a constitutional right. Groups advocating legalized abortion seem to consider this as an unlikely scenario, apparently indicating a perception that the majority of Americans actually do want substantial restrictions placed on access to abortion.

---

[263] See Adamek, table 9.

[264] Senate hearings, December 7, 1981. Barbara Bryant, Vice President, Market Opinion Research. As noted by the Chairman of the Subcommittee on the Constitution, this study was flawed in several respects: its sampling included only three American communities which do not seem representative of American opinions on abortion; questions were worded in vague, misleading or euphemistic ways; respondents were not allowed to express their views on legalization under different circumstances and for different stages of pregnancy; and some of the responses indicate internal inconsistency (for instance, 93 percent of those polled in Springfield, Massachusetts agreed that the abortion decision should be made entirely by the "consenting patient", but 26 percent expressed support for a constitutional amendment that would prohibit abortions). This poll also asked voters about three different proposals for reversing the Supreme Court's abortion decisions, including a proposal like S.J. Res. 110; but since it asked for a choice among these alternatives, rather than for a choice between each of them and the current situation of abortion on demand, it is unfortunately not very useful in gauging the political acceptability of this proposal among the American people. As noted above, only 25 percent of those polled by DeVries & Associates in 1974 elected to let the Supreme Court's decisions stand, and this seems consistent with NORC and Gallup findings on support for abortion on demand.

Dr. Bryant also presented testimony on an analysis of abortion surveys which was commissioned by the National Abortion Rights Action League. This study takes at face value some of the poll results which Dr. Adamek and Judith Blake have analyzed and found wanting, but it ultimately comes to the same conclusions: most Americans want abortion to be legal only under certain extraordinary circumstances.

[265] Medical regulations designed to protect the pregnant woman in a first-trimester abortion, aside from the requirement that the abortion be performed by a licensed physician, are of doubtful constitutionality under current law. A wide range of regulations and "informed consent" requirements have been invalidated by the progeny of *Roe* and *Doe*. In November and December of 1978, investigative reporters from the Chicago Sun-Times published accounts of abuses at legal abortion clinics in the city of Chicago which suggest that such clinics are seriously under-regulated.

If it is true, as some have claimed, that a constitutional amendment should memorialize a consensus instead of trying to create one,[266] S.J. Res. 110 has the potential for reflecting the American consensus on abortion much more accurately than the Constitution as currently interpreted by the Supreme Court does. It is true that some supporters of this measure see it as an opportunity to work toward a more complete national consensus against legalized abortion; but the amendment itself does not require such a result, and allows groups favoring abortion to conduct the same kind of lobbying efforts toward their own goal of unrestricted abortion. Indeed, the obvious fact that it is easier to block controversial legislation than to enact such would seem to give the advantage to the latter groups, if they do in fact represent the majority of the American public. Whatever the final consensus on the substantive issues involved, it would be more likely to garner public respect if it were reached through the democratic process instead of being imposed upon the public by a small number of appointed judges on the basis of highly controversial constitutional arguments. This Committee has heard no testimony showing that respect for the Supreme Court or for Congress is likely to be boosted by Congressional refusal to report out a proposal allowing the American public to express its opinion on the matter.

XI. Overturning Decisions of the Supreme Court by Constitutional Amendment

While there are differences among Members of the Judiciary Committee about legitimate Congressional responses to Supreme Court decisions of which Congress disapproves, there is no disagreement that Congress is fully empowered to propose amendments to the Constitution in response to such decisions. There is certainly ample precedent for such a response to a Supreme Court determination.

The Eleventh Amendment to the Constitution, prohibiting the Federal judicial power from being exercised in suits by citizens of a State against another State, came in response to an action of the Supreme Court in accepting jurisdiction over such a case.[267]

The Fourteenth Amendment, in circumstances not dissimilar from the present case, was proposed to the Constitution in response to the infamous decision of the Supreme Court in the *Dred Scott* case finding that black individuals were non-citizens under the Constitution and, as such, not fully entitled to the protections of the Constitution.[268]

The Sixteenth Amendment, permitting the imposition of a Federal income tax, was later enacted in response to a Supreme Court decision finding that an unapportioned (by State) tax was in violation of Article I of the Constitution.[269]

Finally, the Twenty-Sixth Amendment, according 18-year olds the right to vote in Federal and State elections, was proposed following the Court's decision that the Congress lacked the authority to impose such an obligation statutorily upon the States.[270]

---

[266] This argument has been put forward by Senator Patrick Leahy in his opening statement before the Subcommittee on October 15, 1981. Cf., however, the testimony of Dr. Adrian Rogers, former President of the Southern Baptist Convention, who observed that greater public discussion on this issue was likely to clarify the existence or nonexistence of any "consensus". Senate hearings, November 5, 1981.

[267] *Chisholm* v. *Georgia*, 2 U.S. 419 (1793).

[268] *Scott* v. *Sanford*, 60 U.S. 393 (1857).

[269] *Pollock* v. *Farmer's Loan & Trust Co.*, 157 U.S. 429; 158 U.S. 601 (1895).

In addition, serious efforts at constitutional amendment have been made in response to Supreme Court decisions on the subjects of child labor law [271] and State legislative apportionment requirements.[272]

The proposed Human Life Federalism Amendment, apart from its similarity to these earlier amendments in the sense of attempting to overturn a Supreme Court decision, is also analogous to the Twenty-First Amendment to the Constitution in some interesting respects. As Professor Lynn Wardle, Professor of Law at Brigham Young University, has observed,

> The proposed amendment substantially parallels the Twenty-First Amendment approach to repealing an obnoxious provision of constitutional law . . . The Eighteenth Amendment did two things. Substantively, it adopted the most extreme position possible on the controversy regarding the use of liquor (total prohibition). Procedurally, it severely restricted the authority of the States to control the matter. The Twenty-First Amendment repealed the substantive rule (prohibition). It also granted to the States plenary authority to deal with the issue. The Twenty-First Amendment was designed to allow States to authorize the use of beverage liquor . . . Similarly, *Roe* v. *Wade* amended the Constitution in two ways. Substantively, it adopted one of the most extreme positions possible on the issue of the legality of abortion (abortion on demand). Procedurally, it severely restricted the authority of the States to decide this controversial matter. The Human Life Federalism Amendment directs repeal of the substantive doctrine of abortion privacy. Procedurally, it restores to the States their former authority to prohibit and restrict abortion.[273]

XII. LEGAL MEANING AND EFFECT OF S.J. RES. 110

The first sentence of S.J. Res. 110, which states, "A right to abortion is not secured by this Constitution," is intended to preclude reliance upon any provision of the Constitution as authority for recognition of any right to abortion. In particular, the first sentence is intended to reverse *Roe* v. *Wade* and its companion *Doe* v. *Bolton*, insofar as these cases hold that the Constitution protects an abortion liberty. In addition, any holding in any subsequent Federal or State court decision relying, as a matter of law or public policy, upon the *Roe* or *Doe* decisions, or upon the existence of a constitutionally-founded

---

[270] *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

[271] *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).

[272] *Baker* v. *Carr*, 369 U.S. 186 (1962).

[273] Senate hearings, November 12, 1981, Lynn Wardle, Brigham Young University School of Law. See also the recent works by Professor Wardle elaborating upon this and other issues relating to abortion. L. Wardle and M. Wood, A Lawyer Looks at Abortion (1982); Wardle, The Abortion Privacy Doctrine (1981).

"right to abortion" would be reversed to the extent that the existence of such a "right" was a predicate to that holding.[274]

S.J. Res. 110 does not employ the specific phraseology of the abortion liberty adopted by the Supreme Court in *Roe* v. *Wade*—the "right to privacy" which includes the right to decide "whether or not to terminate a pregnancy." [275] Instead, the proposed amendment employs the more general phrase "right to abortion" in order to emphasize that the amendment is intended to foreclose any potential constitutional recognition of such a right, regardless of how it might be formulated, regardless of how it might be articulated, and regardless of what constitutional provision might be invoked as authority for it. For example, S.J. Res. 110 is intended to foreclose potential use of the Ninth or Tenth Amendments to recognize abortion as a reserved right,[276] as much as it is intended to foreclose use of the Fourteenth Amendment to protect abortion as a "privacy right." Under S.J. Res. 110, there would exist no constitutional authority for any right to abortion.

As Professor Wardle has observed, the term "right to abortion" (or "right to an abortion" or "right of abortion") has been used in at least 84 Federal court decisions since the *Roe* and *Doe* cases were decided, including at least one decision by the Supreme Court.[277] As he notes,

> The phrase "right to abortion" is used as shorthand for the constitutional right created in *Roe* and its progeny, the right of a woman to choose whether or not to have an abortion free from State restrictions.[278]

The modifier "a" rather than "the" is intended to clarify, however, that the "right to abortion" referred to in the first sentence does not simply refer to the precise "right" as originally introduced in *Roe* but any alternative concept of such a right emanating from the Fourteenth Amendment or any other provision of the Constitution.

Since there would exist no constitutional basis whatsoever for the abortion liberty following the passage of S.J. Res. 110, it follows that there would be no "qualified" constitutional right to abortion [279] in any particular circumstance, under any unusual conditions, during any stage of pregnancy or fetal development or as an incident or adjunct to some other recognized and protected right. Thus, for example, it could not be claimed that a putative "right to health" would immunize abortions from legislative restriction. There would be no case in which any abortion would be the object of any special constitutional protection.

---

[274] E.g., *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976) (parental consent, spousal consent, second trimester abortion regulations, and standard of care provisions invalid; informed consent regulation subject to special judicial scrutiny). See also, e.g., *Colautti* v. *Franklin*, 439 U.S. 379 (1979) (standard of care provision held invalid under special judicial scrutiny). *Bellotti* v. *Baird* (II), 443 U.S. 622 (1979) (parental/judicial consent law held invalid: special judicial procedures required): *Robak* v. *United States*, 658 F.2d 471 (7th Cir. 1981) (parents may sue government hospital for failing to provide opportunity to abort handicapped infant). On the scope of the proposed amendment, see also the testimony of Professor Victor Rosenblum, Northwestern University School of Law; Vice-Chairman, Americans United for Life Legal Defense Fund. Senate hearings, November 16, 1981.

[275] *Roe* v. *Wade*, 410 U.S. 113, 153.

[276] See e.g., *Roe.* v. *Wade*, 410 U.S. 113, 153.

[277] *Connecticut* v. *Menillo*, 423 U.S. 9, 10 (1975).

[278] Senate hearings, November 12, 1981, Professor Lynn Wardle, Brigham Young University.

[279] Cf. *Maher* v. *Roe*, 423 U.S. 464, 473–474 (1977).

This is not to say, however, that the Amendment is intended to immunize abortion-related legislation from other general strictures of the Constitution insofar as they do not protect abortion itself. Thus, for example, a law prohibiting individuals from advocating abortion-on-demand would clearly be in violation of the First Amendment to the Constitution, while a law making distinctions with respect to when abortions are to be permitted on the basis of a woman's race would clearly run afoul of the Equal Protection Clause of the Fourteenth Amendment. Only such restrictions growing out of general provisions of the Constitution would serve to restrict legislation relating to abortion. Such provisions could not have the effect of restoring in even a minor way any constitutional impediments to the right of the representative branches of government to "restrict and prohibit" abortion.

The term "right to abortion" is used in the first sentence also to clarify that it is not the intention of the proposed amendment to affect any other aspect of the "right of privacy" other than the "right to abortion" component. Other formulations of the "right of privacy", e.g. use of strictly contraceptive devices, would not be affected by the proposed amendment.[280] The use, production, and distribution, for example, of drugs, devices, or techniques for preventing the initiation of the fertilization process would not be within the intended scope of the amendment.

The phrase "not secured by this Constitution" in the first sentence is simply meant to clarify that the proposed amendment seeks to disestablish any theory of constitutional law upon which the existence of a right to abortion can be predicated. It is primarily designed to establish a new locus for decision-making authority, i.e. legislatures, not the courts. In addition, S.J. Res. 110 does not deny that the unborn are "persons" within the context of the Fourteenth Amendment and, as such, entitled to the protections of that Amendment. Nor does it deny that the unborn may otherwise be the proper subject of any constitutional rights. It is not intended to foreclose judicial recognition of constitutional status for the unborn nor the enforcement of any right that the unborn may be found to possess.

S.J. Res. 110 merely affirms the power of legislatures to legislate with respect to "abortion" and denies the existence of any constitutional protection for "abortion". By the term "abortion", the Committee intends to include those actions which intend the destruction of the human embryo or fetus. Thus, both the direct destruction of the unborn and the indirect destruction—for example, by induced expulsion of the fetus from the mother's body before it is capable of survival—would be within the terms of the proposed amendment.[281] All individual organisms of the species *Homo sapiens* from the onset of fertilization until live birth or its equivalent, without regard to the stage or locus of development, inside or outside the mother's body, would be within the permitted scope of protection of the amendment.

The second sentence of the proposed amendment would vest in Congress and each of the States co-equal, independent, and plenary power to make and enforce laws relating to abortion. It is intended by virtue of this sentence that Congress and the States would possess the broadest authority to legislate with respect to abortion. The circumstances and conditions under which abortions would be proscribed or restricted would be a legislative matter to be determined through normal democratic processes.

---

[280] See e.g., *Griswold* v. *Connecticut*, 381 U.S. 479 (1965).

[281] Induced premature expulsion of the viable fetus in order to preserve fetal life or health is clearly not within the scope of S.J. Res. 110. In general, Congress and the States would have "the power under the . . . amendment rationally to determine what are the badges and incidents [of abortion] . . . and the authority to translate that determination into effective legislation." *Jones* v. *Alfred Mayer Co.,* 392 U.S. 409, 440–3 (1968). See also *Everard's Brewery* v. *Day,* 265 U.S. 545, 560 (1924).

The intended extent of such legislative authority and the relationship between Federal and State laws enacted pursuant to this authority can, perhaps, be best understood by separating discussion of the second sentence of the amendment into two components.

"CONCURRENT POWER"

By the phrase "concurrent power to restrict and prohibit abortion", it is intended that Congress and the States have the power to enact and enforce any laws rationally related to restricting abortion which they may, in their judgment, deem appropriate. The meaning of the term "abortion" intended here is precisely the same as the meaning expressed with respect to the first sentence of the amendment. The power contemplated is one which is to be purely discretionary with each sovereign but which, within its respective sphere of operation, is a plenary one which may be exercised by either sovereign. If either sovereign acts, it may employ whatever legislative means it deems appropriate to restrict abortion, subject as already noted to other general provisions of the Constitution, e.g., First Amendment, Equal Protection Clause.

It may choose to enact criminal or civil or regulatory sanctions, or it may choose not to impose sanctions of any kind. As noted earlier in this Report, Congress or the States may choose to prohibit abortions totally or they might choose not to limit abortions at all. In addition, either sovereign might choose some legislative course between these extremes. For example, it might choose to restrict abortions occurring during later stages of a pregnancy; it might choose to require parental consent for abortions performed upon minors; it might choose to require spousal consent to abortion; it might choose to restrict fetal experimentation; it might choose to impose obligations upon doctors to save the lives of those aborted fetuses capable of survival; or it might choose to require that women be apprised of alternatives to abortion. It might also choose any combination of the foregoing or countless other legislative options.

The phrase "restrict and prohibit" is designed to allow for the exercise of the legislative power over the fullest possible range of abortion-related activity. The word "and" is not meant to require a choice between doing both or doing neither. Rather, it is intended simply that the legislative power extend to both restrictions and prohibitions. Of course, there is a third alternative available to Congress and the States—the alternative of choosing neither to restrict nor to prohibit.

The word "power" in the second sentence simply means that the legislative branches of government will have discretion under the Constitution to "restrict and prohibit" abortion. Such power need not in fact be exercised.

The term "concurrent power" has been used in the proposed amendment for the specific purpose of allowing for the exercise of plenary power by each sovereign independently of the other.[282] Subject to the proviso clause (discussed infra), each sovereign's legislative enactments would have effect within its jurisdiction, regardless of the presence or absence of legislation of the other sovereign. Thus, for example, if the State of Texas chose to prohibit all abortions and Congress chose to enact no laws against abortion, the laws of Texas would be of full force and effect within Texas. An abortion performed within Texas would, to that extent, violate the laws of Texas and be subject to enforcement by Texas; it would not, however, violate the laws of the United States and would not be enforceable by the Federal Government.

Conversely, if the State of Texas chose to enact no laws against abortion and Congress chose to prohibit all abortions, no abortion would be legal in Texas (or elsewhere within the territorial jurisdiction of the United States). An abortion performed within Texas would not violate the laws of Texas and would not be enforceable by Texas, but it would violate the laws of the United States and be enforceable by the Federal Government.

In the instance where both a State and Congress have chosen to enact laws prohibiting abortions, sanctions might be imposed both by the State and by Congress. Each sovereign would have independent power to enact laws prohibiting abortion and an act in violation of both of these laws would be in violation of the legislative will of each sovereign.[283] This would not be different from the treatment of a violator of Federal and State laws in any other area in which they possess concurrent jurisdiction to act.

An important reason for the adoption of the concept of concurrent power in the proposed amendment is that it allows for independent exercise by each sovereign of its power to the fullest extent possible. Only those exceptional instances in which a provision of a law of one conflicts with a provision of a law of the other would limit this effect (discussed infra), and this would always be in favor of the provision which is more restrictive of abortion. Practical problems of conflict would largely remain within the purview of the Congress and the State legislatures to resolve.

The term "concurrent power" is also contained in the enforcement clause of the Eighteenth Amendment to the Constitution and, in that context, has been construed by the Supreme Court in *United States* v. *Lanza* and subsequent cases. It is intended that these cases provide direction with respect to the meaning of "concurrent power" within the scope of the immediate amendment. In particular, the Committee wishes to incorporate the following general language from the *Lanza* case:

> [It] means that the power to take legislative measures . . . shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist. Each State, as also Congress, may

---

[282] See *National Prohibition Cases*, 253 U.S. 350 (1920).

[283] *United States* v. *Lanza*, 260 U.S. 377 (1922). As with the Eighteenth Amendment, each sovereign would derive its power from a different source: Congress would derive its power from the amendment itself: the States would derive their power from the inherent police power of the States, as thus freed from constitutional impediments by the amendment. Thus the Double Jeopardy Clause would not be applicable.

> exercise an independent judgment in selecting and shaping measures. . . . Such as are adopted by Congress become laws of the United States and such as are adopted by a state become laws of that state. They may vary in many particulars, including the penalties prescribed, but this is an inseparable incident of independent legislative action in distinct jurisdictions.
>
> . . . [T]he probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power . . ., state power would be excluded. In effect the . . . section . . . put an end to restrictions upon the state's power arising out of the federal Constitution and left her free to enact . . . laws applying to all transactions within her limits. . . .
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each may, without interference by the other, enact laws. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the others.[284]

PROVISO CLAUSE

It is possible that conflicts may occasionally arise between specific provisions of a law of Congress on the subject of abortion and the provisions of the law of a particular State on the same matter. The proviso is built on the premise that in cases of such conflict the Supremacy Clause of the Constitution (Article VI, clause 2) will be operative, except as modified by the proviso.[284.1] Thus, where a provision of a law of Congress is more "restrictive" of abortion than a conflicting provision of a law of a State, the provision of the law of Congress will govern by virtue of the operation of the Supremacy Clause. The law of Congress would "preempt" the less restrictive State law to the extent of the conflict, while allowing all other provisions of both laws to remain valid.

When a provision of the law of a State, however, is more "restrictive" of abortion than a conflicting provision of a law of Congress, the State law provision will govern by operation of the proviso.

Finally, in those instances of conflict between provisions of State and Federal law in which neither provision may reasonably be characterized as more or less "restrictive" of abortion, the provision of the law of Congress would govern through operation of the Supremacy Clause.

---

[284] *United States* v. *Lanza*, 260 U.S. 377, 381–82 (1922).

[284.1] One kind of conflict that the proviso is directed toward is illustrated by the decision of the Supreme Court in *Hostetter* v. *Idlewood Liquor Corporation*, 377 U.S. 324, 332 (1964) in which, despite the Twenty-First Amendment's commitment of plenary, regulatory power to the States, the Supreme Court ruled that the Commerce Clause justified the documentary sale of liquor at an international airport in accordance with Federal law even though in contravention of New York State law. Conflict may arise also with respect to provisions of Federal and State legislation both enacted under the authority of the proposed amendment, although given the concept of "concurrent power" articulated by *Lanza*, see supra note 284, the Committee does not anticipate that these occasions will be frequent. The Committee recognizes, however, that the differing context of the use of "concurrent power" in the Eighteenth Amendment and the proposed amendment, as well as the unpredictable nature of judicial decisions and interpretations that may be made with respect to the proposed amendment, make the inclusion of the proviso clause necessary.

While the Committee wishes to reiterate its belief that conflicts between provisions of laws will not frequently arise under the concept of "concurrent power" properly understood, the proviso is designed to resolve any unforeseen conflicts between State and Federal law that may emerge following the adoption of the proposed amendment. The proviso is also intended to forestall the possibility that a future court will be tempted, incorrectly, to construe a conflict in order to overturn a more restrictive State law by means of the Supremacy Clause.

XIII. Miscellaneous Issues

WHY CONGRESS?

Under S.J. Res. 110, Congress as well as the States would be vested with the power to legislate with respect to abortion. Inasmuch as this power was once arguably left entirely to the States before *Roe* v. *Wade*,[285] and is a matter which is subsumed under those areas of health, safety, and welfare which have traditionally been left to the States under the broad aegis of the police power, it may be asked why Congress should be accorded this power as well under S.J. Res. 110.

A principal reason is that such a power is necessary to ensure that abortion policies adopted by the majority of States are not defeated by the existence of a small number of States serving as "abortion havens". In the absence of any Congressional authority, a consensus policy on abortion adopted by virtually all of the States might be effectively undermined by no more than a small number of States that had adopted a policy on abortion widely at variance with that consensus.

Unlike other areas of State law which might require domicile or residence within a State in order to take advantage of its provisions, there would be virtually no practical barriers whatsoever to individuals attempting to take advantage of whatever law on abortion they preferred, regardless of the State in which they reside. Literally, they could cross State lines, obtain an abortion under the more permissive laws of that State, and return home, within a matter of hours. In the process, the abortion policies of the individual's home State, as well as what might be the policy of the great majority of States, would be defeated.[286]

While there are no limits to Congress' authority under the express terms of the proposed amendment, it is nevertheless intended that Congress should attempt, through its own legislation, to reflect any clear national consensus on abortion that may develop. It is the intent of this Committee that Congress should exercise its authority under the amendment to preserve that consensus developing in the States by establishing as a national standard any such consensus. In other words, the authority in Congress is designed to ensure that abortion does not remain a matter of national controversy simply because there are isolated States with policies widely divergent from the mainstream.

---

[285] Cf. however, *Marshall* v. *United States*, 355 F.2d 999, 1004 (9th Cir. 1966); 18 U.S.C. 1462 (trafficking in abortifacients). See also generally Witherspoon, "Impact of the Abortion Decisions Upon the Father's Role", Jurist, Winter 1975 at 32, 43–45. More recently, advocates of legalized abortion prior to *Roe* v. *Wade* attempted to legalize abortion throughout the 50 States by means of a Federal statute, arguing that the inconsistent patchwork of laws then existing in the United States lacked the uniformity that would promote respect for the law; see, e.g., Statement of Senator Packwood, Cong. Record, May 3, 1971, S6057–58.

[286] See *Bigelow* v. *Virginia*, 421 U.S. 809 (1975).

It should also be borne in mind that even to the extent that Congress intends by this amendment largely to restore the status quo that existed prior to *Roe*, a simple "State's rights" amendment may have shortcomings. First, the burden would lie with the States to act, despite the fact that at the time of *Roe* virtually every State in the Union had already acted to outlaw abortion under some or virtually all circumstances. Second, the decade since has seen some impact on the values of society as a result of the legal regime created by the Court. To the extent that the law has a teaching role, it has exercised that function for the past decade in a manner designed to undermine the status quo that existed at the time of *Roe*. While it is impossible to estimate precisely the impact of these factors, the Committee nevertheless believes that the instant amendment may restore the status quo ante more faithfully than a pure "State's rights" amendment.

The power in Congress is also necessary to avoid possible limitations on Federal power to regulate interstate trafficking or commerce in abortifacients, and to ensure Federal regulatory authority over the production, distribution, and use of such products and devices. It is also necessary to remove any doubt with respect to Congress' power to deal effectively with abortion in United States territories and dependencies, and in the District of Columbia. Under this amendment's grant of power to Congress to legislate with respect to abortion in these places, Congress will clearly be able to exercise in each of them a power equivalent to the power of each State within its own boundary.

DOES S.J. RES. 110 BELONG IN THE CONSTITUTION?

A frequent subject of criticism of the proposed constitutional amendment during the hearings was the notion that basic questions of individual rights should not be decided by a majority vote. Senator Packwood expressed this view in an especially articulate manner.[287]

As an abstract proposition, there are indeed few Members of this Committee who would disagree with this proposition, whatever their perspective on the issue of abortion. As Senator Hatch noted, however, during the hearings,

> I agree that the fundamental rights of individuals should not be determined by referendum . . . The problem, of course, is that few can agree on what precisely these "individual rights" are that are involved with the abortion issue. Critics in the "pro-choice" movement see these as being the right of the pregnant woman to determine how her body is used, while critics in the "pro-life" movement see this as the even more fundamental right of the unborn to life itself.[288]

In other words, there is just as much disagreement on the issue of what constitutional "rights" are involved here as there is on the issue of the morality of abortion itself. It thus begs the question to attack the immediate amendment as one "restricting rather than expanding" rights.

The purpose of S.J. Res. 110 then is not to resolve the persistent issue of which of these conflicting "rights" is paramount, but rather to establish a balancing process for determining how this conflict will be resolved in the context of individual circumstances. In short, this balancing process will take place in the same forum in which it takes place in the context of most other controversial public policy issues—within the legislative branches of Government.

---

[287] Senate hearings, Oct. 5, 1981, Robert Packwood, U.S. Senator.

[288] Senate hearings, Oct. 12, 1981, opening statement of U.S. Senator Orrin G. Hatch, chairman, U.S. Senate Judiciary Subcommittee on the Constitution.

In the absence of any national consensus on whether or not the "rights" of the unborn or the "rights" of the pregnant woman will generally take precedence, this Committee believes that the necessary balancing of interests can better occur within legislative bodies than within judicial bodies. The latter are ill-equipped to make this kind of resolution because of the strictures of the "case or controversy" requirement as well as the inability of judicial bodies to engage in the kind of negotiation and compromise that routinely occur within legislative bodies. Until such a national consensus clearly develops, perhaps justifying subsequent constitutional initiatives, this Committee believes that the constitutional change effected in *Roe* v. *Wade* ought to be repealed.

Similarly, the notion that abortion is a "private" matter to be determined by the individual begs the basic question involved in the abortion debate. Because they perceive another human being to be involved in the abortion decision, i.e., the unborn child, those who are generally opposed to legalized abortion do not see the issue as a purely "private" matter. To allow matters to be determined according to one's own "conscience" is no more acceptable to this point of view than to allow other physically assaultive actions to be judged by individual standards.[289] As observed by one witness,

> The death of any of our fellow humans cannot be a "private" matter subject only to the values, or lack of them, of the one who seeks or causes his or her death.[290]

No simple formulation about the proposed amendment interfering with individual rights or with decisions appropriately left to the individual can obscure the basic truth that these formulations themselves accept implicitly the arguments of a single side of the abortion debate. Only the proposed amendment can serve to facilitate a genuine resolution of the indisputably difficult issues involved in this debate.

XIV. SOME QUESTIONS AND ANSWERS ON THE HUMAN LIFE FEDERALISM AMENDMENT

1. What would the Human Life Federalism Amendment do? The Human Life Federalism Amendment would permit Congress and the individual States to legislate with respect to abortion. Since the Supreme Court's decision in *Roe* v. *Wade* in 1973, finding a previously unrevealed right to abortion in the Constitution, the issue of abortion has been treated as a matter outside the authority of the elected, representative branches of government. The Human Life Federalism Amendment would largely restore the status quo that existed prior to the *Roe* case and re-establish in the legislative bodies of government primary decision-making authority over abortion.

---

[289] "We should also reject the suggestion, however tempting, that the problem should be left to individual choice because it is too hard to be solved by collective means. The preference for individual choice is quite proper when we ask whether a person should take advantage of a liberty that is his, but it cannot be accepted where the very question raised concerns the appropriate social limits to be placed upon individual choice. Suppose the mother believes that the fetus is not a person, but the person next door thinks otherwise. Can the mother have the abortion, or can that third person interfere, claiming the general privilege of the criminal law to act in the defense of third persons? The point must be decided one way or the other for both parties, who cannot be allowed to make individual decisions. The criminal law in general does not allow an individual to decide which of its collective pronouncements it will honor and which it will not, and that rule must apply in hard cases as well as easy ones. The problem must be met. We must do the best that we can." Epstein at 172.

[290] Senate hearings, November 16, 1981, Dennis Horan, Chairman, Americans United for Life Legal Defense Fund.

2. Is the Amendment a "State's rights" amendment? Not exclusively. While the Amendment would permit the States to legislate with respect to abortions within their jurisdiction, it would also permit Congress to legislate in this area. An important justification for such national authority is to enable Congress to ratify any national consensus that develops among the States on the abortion issue by establishing that consensus as a minimum standard. Otherwise, so-called "abortion havens" in a very few States would be permitted to defeat a genuine consensus on abortion that might develop in the large majority of States.

3. Would either the States or Congress be required to legislate on the abortion issue? No. Unlike various other amendments that have been proposed to the Constitution on the subject of abortion, there would be no obligation for a State or for Congress to act. They would, however, have authority to act, something that they are presently lacking as a result of the *Roe* decision.

4. What would happen if a State passed a law, but Congress did not? The State law would have full force and effect within the jurisdiction of that State, while having no force or effect in any other State. No State would be required to act. If they all acted, there might conceivably be 50 different abortion laws in the States, much as in many other areas of law where the States have authority to act.

5. What would happen if Congress passed a law, but a State did not? The Federal law, unless its provisions specified otherwise, would apply within each State in much the same manner as a law passed by the legislature of that State. Congress, if it chose to do so, could enact a minimum standard that would apply to all 50 States.

6. What would happen if both Congress and a State passed laws and they conflicted in some particular? To the extent that there were no irreconcilable conflict, both laws would continue to have full force and effect within that State. Otherwise, the provision more restrictive of abortion would govern.

7. What would be the role of the President under the proposed Amendment? As with any other Federal law, the President would have to sign any law approved by Congress under this Amendment. If he did not, Congress would have to override his veto by the normal constitutional process.

8. What would be the role of the Federal courts under the proposed Amendment? Federal courts would no longer be able to expound a constitutionally protected "right" to abortion. There would no longer be such a "right" in the Constitution (if, indeed, there ever was one). The Federal judiciary, of course, would continue to have responsibility for determining the meaning of the Amendment or any Federal law enacted under its authority. Other general provisions of the Constitution, e.g., First Amendment, Equal Protection Clause, would continue to limit legislative enactments, as on other matters. State courts would continue to have authority to interpret the provisions of State laws and constitutions.

9. How would the Amendment treat such matters as rape or incest or abortions related to the health of the mother? The Amendment itself does not speak to these issues. These would be issues within the competence of the representative branches of the Government to decide in their best judgment.

10. How would laws passed by Congress or the States under the authority of the proposed Amendment be enforced? They would be enforced in the same manner as any other law enacted by Congress or the States. Congress and each of the States would be permitted to establish whatever enforcement mechanism they desired—otherwise consistent with the Constitution—and whatever penalties or sanctions they desired, subject also to this limitation. Generally, State laws would be enforced in State courts and Federal laws in Federal courts.

11. Does the proposed Amendment seek to answer the question of when life begins? No. It simply establishes that there is a legitimate public interest, to be addressed through the legislative process, in protecting unborn children. It does not attempt to define human life apart from recognition of this interest. The proposed Amendment would confer no legal status upon the unborn except to the extent of permitting their lives to be protected through legislation.

12. What could Congress or the States do under the proposed Amendment? Congress or the States would have plenary power to legislate with respect to abortion, in the best of their judgment. They could choose to do nothing or they could choose to prohibit abortions entirely. They could enact civil or criminal or regulatory sanctions. They could choose, for example, to enact fetal protection statutes, limitations upon late abortions, requirements of parental consent for abortions performed upon minors, requirements of spousal consent, requirements that women be apprised of alternatives to abortion, limitations upon fetal experimentation, waiting periods for abortions, and so forth.

13. How would the Amendment become part of the Constitution? Before becoming a permanent part of the Constitution, the proposed Amendment would have to earn the support of two-thirds of the Members of each House of Congress and the approval of three-fourths (38) of the State legislatures.

XV. CONCLUSION

For the foregoing reasons, the Committee on the Judiciary recommends the enactment of the subject resolution proposing an amendment to the United States Constitution.

XVI. COST ESTIMATE

Pursuant to Section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91–510), the Committee estimates that there will be no costs to the Federal government resulting from passage of this resolution.

XVII. ADDITIONAL VIEWS OF SENATOR SIMPSON ON S.J. RES. 110

Throughout my public life—for 13 years as a member of the Wyoming State Legislature and three years as a member of the U.S. Senate—I have held the same position on the issue of abortion. It is a position I have come to as a father and husband and from the very rich and deeply personal experiences shared with me by a wide variety of persons during the 20 years I practiced law in Cody, Wyoming. It is unfortunate that a person's public position on this issue can be distorted and manipulated by those persons—on both sides of the issue—who seek to influence the public debate and policy on the question of legalized abortion in this nation. But that is a political fact of life. So I wish to again make clear my personal views on the issue of abortion before I comment specifically on S.J. Res. 110, the proposed constitutional amendment on abortion as reported by the Senate Judiciary Committee.

I am not in favor of and have never supported the concept of "abortion on demand"—and never will. However, I do believe that a pregnant woman should have the freedom of choice—after consultation and the unanimous decision of her spouse (if one), her pastoral counselor (minister, priest, rector, bishop, et cetera), and her physician—to have an abortion performed in the first trimester of pregnancy, if it is determined that carrying the pregnancy to full term would be injurious to her mental or physical health.

As long as abortion remains a legally acceptable surgical procedure it should be available to the indigent as well as to the wealthy. I also feel that any public funding of such a surgical procedure should be considered on a "case by case" basis and hopefully financed at the state level with state funds and not through the Federal Treasury.

This is a most deeply personal, moral and religious decision and one that often results in great trauma and anguish. However, I feel—after long and most serious consideration—that this decision must remain for determination in a manner I have described.

I do very much respect the views of others on this most serious issue. I do not ask or demand that others agree with me in my longstanding position on abortion—I ask only for their thoughtful understanding. I believe it is so important in considering this highly emotional issue to realize that those who hold a different position often have the same depth of sincerity, love and concern as that expressed by persons holding fast to the other viewpoint.

Now let me address S.J. Res. 110, a proposed constitutional amendment to establish legislative authority in Congress and the states with respect to abortion.

I have always had a particular and serious concern with the provision of S.J. Res. 110 which would allow a state law to pre-empt a federal statute—but only if the state law would uphold a more restrictive abortion policy. I do not favor making a constitutional distinction between individual states' law which are pro or anti-abortion as related to federal laws. Under this amendment any state which chooses a "more liberal" abortion policy than set out in federal standards would be overruled. This certainly does not seem to me to provide for a consistent policy for the role of the state legislatures in determining the legality of abortions within their boundaries. That provision of S.J. Res. 110 is therefore most troublesome to me.

I feel that this provision would mean that this issue would be continually placed before the Federal Congress for a decision. That would be the result of the "concurrent power" clause. It is my personal belief that the issue—if handled at all by any legislative branch—should be handled on the state level. It should be removed from the Federal Congress. Certainly there may be states that may enact a very lenient abortion law, but that is the way the federal system works. A Massachusetts' state law on gun control would be no more acceptable to Wyoming than our feelings on that issue would be acceptable to Massachusetts. That is the strength of our federal unity and our diversity.

If this issue is to be determined by legislatures, I believe it would be in the best interest of the country if the abortion issue is placed in the hands of individual states with individual legislatures making the decision—with individual constituencies in those various states assisting in making the determination.

In my judgment S.J. Res. 110, as it is now written, would not resolve this wrenching and emotional issue. However, I also believe that the Federal Congress can no longer avoid debating this issue—up or down—on its own merits. For many years now we have debated the abortion question on amendments offered to appropriations bills—amendments which have dealt with federal funding for abortions under federal health and other programs. This exercise has proved to be a futile and unacceptable one to persons on both sides of the issue.

I voted to report the S.J. Res. 110 from the Judiciary Committee to the full Senate in order that this full debate on abortion can be held. We now have a vehicle through this legislation to do that.

I do still specifically object to the feature of the bill which places power in the federal legislature to restrict and prohibit abortions, as well as to the provision which holds that state policy on abortion will be overruled if there is a federal policy which is more restrictive. My vote to report the bill from Committee does not dilute those objections.

Consequently, when casting my vote to report S.J. Res. 110, I stated clearly that I would reserve the right to offer amendments during floor debate to change those features of the bill which I find objectionable and to reflect my personal views on this issue. I will do so in the spirit of thoughtful and deliberate debate on one of the most thought-provoking and anguishing issues I have faced as a public official—and as a private citizen who deeply desires to exercise his own personal judgment on this question in a compassionate, loving and humane manner.

ALAN K. SAMPSON.

XVIII. MINORITY VIEWS OF SENATORS LEAHY AND BAUCUS

S.J. Res. 110 came to the Judiciary Committee after hearings in the Constitution Subcommittee that can only be characterized as thorough and fair. Yet, the clear message of the hearings, taken as a whole, is that the nation is deeply divided on the issue of abortion. The proponents of S.J. Res. 110 candidly acknowledge this division in the very architecture of the amendment. It apparently overrules *Roe* v. *Wade* but does not replace that case with any other principle of law, because no amendment outlawing abortion could now be successfully passed by a two-thirds vote of each House of the Congress or ratified by three-fourths of the states.

Instead of an affirmative principle of law, S.J. Res. 110 proposes a reassignment of the authority and responsibility for deciding abortion, a reassignment from the courts to the legislative branch, Congress and the state legislatures.

The response of S.J. Res. 110 to the deep division in public opinion is to use the amending process—and the requirements of super-majorities in the Congress and the states—not to declare that the right to abortion is extinguished, but that it is downgraded.

Under S.J. Res. 110, what used to be a constitutionally protected right could be altered by a simple majority of any state legislature or by the Congress. S.J. Res. 110 declares that if there can be no national consensus on prohibiting a right declared by the Supreme Court, it is a fair compromise to make that right statutory, rather then constitutional—changeable by this or that legislative majority.

This sort of "compromise" could be offered to solve any number of knotty issues arising under the Constitution. Two-tier amendments could leave to the legislative branch, acting alone, the difficult issues of separation of church and state, freedom of expression, protection of individual rights in criminal cases, and the rights of minorities, just to name a few.

University of Pittsburgh Law Professor Tom Gerety put it well when he testified before the Constitution Subcommittee that S.J. Res. 110 does not take the abortion issue on "straight as a moral and constitutional question [but instead] it turns it into a procedural and political one. Bare majorities will, under this amendment, decide the question in this state and that . . . This is the Missouri Compromise on abortion."

The adoption of S.J. Res. 110 would make a definite statement about how rights are protected in our democracy. If you don't like a right currently protected by the Constitution and you don't have the votes to amend it away, then amend the Constitution to take it away from the protection of the courts. This is the message of S.J. Res. 110, and it is a bad message.

While this proposal does not act directly to limit court jurisdiction in the manner of some school busing, school prayer, and abortion bills now pending in the Senate, the spirit and the effect of S.J. Res. 110 are identical. The courts are politically the most vulnerable branch of government in the sense that they cannot activate support through the political process. They lack an independent enforcement cadre and rely rather on other agencies of government to carry out their mandates. Their effectiveness, more than in the other branches, relies on an implicit compact among members of the society to accept their final decrees as binding. One shield the judiciary has against the excesses of the legislative branch is the requirement of a super-majority in order to overturn a judicially declared right.

S.J. Res. 110 not only weakens the judicial branch of government as effectively as the court-stripping legislation now before the Senate, but it would enshrine the change in the Constitution, where it would not be easily altered when it became clear once more that the courts are best guardians of personal rights.

The importance of the judicial branch issue to the supporters of S.J. Res. 110 is underscored by their use of strong anti-judiciary arguments. The supporting arguments of S.J. Res. 110 have trumpeted the "reenfranchisement of all the people" and have castigated the imposition of personal views by the unelected elite of the Supreme Court.

This kind of rhetoric undermines the function of the judiciary, not only on abortion, but in the delineation of personal liberties of all kinds under the Bill of Rights. It is by now a truism that the First Amendment is most ardently embraced when unpopular views seem to disturb the placid consensus. It would be catastrophic for liberty if the acceptability of unpopular views were put to a majority vote of the people. Professor Lawrence Tribe of Harvard put it well during the hearings when he said, "We don't arrive at liberties through consensus . . . Democracy has always been limited" by judicial interpretations to safeguard basic rights.

The independent judiciary has always been closely associated with individual rights. There is no mechanism available in the Constitution to vindicate the Bill of Rights without access to a judge who can weigh the validity of an asserted right free of popular pressures of the moment. The respect for this role of the courts is reflected in the few times that amendments have reversed court decisions.

Whether or not *Roe* is a wise, well-constructed and workable decision, S.J. Res. 110 is a poor cure for its defects. The Constitution Subcommittee hearings make very clear that most Americans oppose a constitutional ban on abortions, and while a majority of Americans may not agree with the precise formulation in *Roe* v. *Wade*, particularly as that formulation is represented in some surveys, there is no substantial support for correcting the defects in *Roe* by removing the abortion question from the courts and depositing it with the Congress and the state legislatures.

We believe that S.J. Res. 110, along with the other proposed abortion amendments, would resolve the abortion controversy in a manner that is offensive to the sensibilities of a majority of Americans and would not promote an end to the controversy or an end to abortion. Abortion is not a topic precluded entirely from the forums of public policy. State and local governments can decline to allow abortion in public facilities, and hospital boards can do the same. Congress can withhold funds for abortion and can promote incentives to childbirth.

The states can prohibit third trimester abortions except to protect the life or health of the mother, and if there is any attempt to use the "health" criterion to obtain an elective abortion in the third trimester on the rubric of mental health—a scenario that at the heart of the argument that we have abortion-on-demand for nine months of pregnancy—that attempt can be held up to judicial scrutiny and the issue finally settled.

Nor is there any reason to believe that further limitations and qualifications cannot be developed by the states consistently with *Roe* v. *Wade*. With additional appointments to the Supreme Court, in time *Roe* v. *Wade* itself might be qualified, clarified, or even overruled. While this process may take a great deal of time, if it occurs at all, and while the normal ratification process for a straightforward human life amendment would certainly be a long one, the changes that occur in this way are very likely to enjoy the respect of the people they govern. Even more importantly, the institutions for promoting change within the legal system will have been honored and preserved.

By contrast, both S.J. Res. 110 and the arguments promoting it as a middle ground between two extremes, are misleading. It is not a middle ground between two extremes, but rather one extreme in two steps.

PATRICK J. LEAHY.
MAX BAUCUS.

○